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UNCHARTERED TERRITORY: MARKET COMPETITION'S CONSTITUTIONAL COLLISION WITH ENTREPRENEURIAL SEX-SEGREGATED CHARTER SCHOOLS

*David Groshoff**

I. INTRODUCTION¹

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1. The following definitions explain the terms used in this article. First, "status-conscious," "status-identifiable," "single-sex," and "sex-segregated," include some of the terms that legal scholars have used to identify schooling that separates students based on sex. See, e.g., Tomiko Brown-Nagin, *Toward a Pragmatic Understanding of Status-Consciousness: The Case of Deregulated Education*, 50 DUKE L.J. 753 (2000); David S. Cohen, *No Boy Left Behind? Single-Sex Education and the Essentialist Myth of Masculinity*, 84 IND. L.J. 135 (2009); Nancy Levit, *Separating Equals: Educational Research and the Long-Term Consequences of Sex Segregation*, 67 GEO. WASH. L. REV. 451 (1999). Unless quoting third parties, I use the term "sex-segregated" to describe this type of education.

Second, despite Justice Ginsburg's desire to use "the term 'gender discrimination' as a synonym for 'sex discrimination,'" Adam Liptak, *Ginsburg Shares Views on Influence of Foreign Law on Her Court, and Vice Versa*, N.Y. TIMES, Apr. 12, 2009, at A14, the terms "gender" and "sex" are distinguishable in practice, and the legal community should be hesitant to equate these terms. See, e.g., Patience W. Crozier, *Forcing Boys to Be Boys: The Persecution of Gender Non-Conforming Youth*, 21 B.C. THIRD WORLD L.J. 123, 125-26 (2001) ("Sex refers to whether a person is male or female based largely on anatomical factors such as external genitalia. Gender refers to the characteristics associated with masculinity and femininity." (quoting CHRISTINA HOFF SOMMERS, THE WAR AGAINST BOYS (Simon & Schuster 2000)) (citations omitted)); see also Anna I. Corwin, *Language and Gender Variance: Constructing Gender Beyond the Male/Female Binary*, 12 ELECT. J. HUM. SEXUALITY (2009), available at

"The concept of a charter school is based on the free-market theories of the [1976 Nobel Prize winning] libertarian economist Milton Friedman, who asserted that providing parents with a choice would result in an overall improvement in the school system."² After winning an election campaign in

<http://www.ejhs.org/Volume12/Gender.htm> (indicating that the meaning of gender is broader than that of sex). I therefore consider solely the legal question of charter schools segregating students born with — and continuing to possess — male or female genitalia, and I assume that the broader gender-relevant legal implications involved with intersex, transsexual, transgender, and genderqueer individuals are beyond the scope of this Article. Thus, to reflect the specific analysis appropriately, I use the term "sex," rather than Justice Ginsburg's preferred but more confused use of "gender."

Third, for the definition of "charter school," see *infra* Part II.B.1. Depending on context, I use "charter" and "charter school" interchangeably.

Fourth, "public" in the context of public education is amorphous ("In a world where charter schooling . . . and other recent developments no longer fit neatly into our conventional mental boxes . . . [t]he 'publicness' of a school does not depend on class size, the use of certified teachers, rules governing employee termination, or the rest of the procedural apparatus that ensnares traditional district schools." Frederick M. Hess, *What is a "Public School?" Principles for a New Century*, AM. ENTERPRISE INST. 1, 1, 14 (2004)). Massachusetts Secretary of Education Paul Reville recently asserted that public schools have traditionally been "large-scale, highly bureaucratic, monopolistic" institutions; I use the term "traditional public" to refer to these schools. KATHERINE K. MERSETH, *INSIDE URBAN CHARTER SCHOOLS: PROMISING PRACTICES AND STRATEGIES IN FIVE HIGH-PERFORMING SCHOOLS* x (Harvard Education Press 2009). Because charters are materially government financed, see *infra* Part II.B.1, charters are "public schools." I therefore discuss two flavors of K-12 public schools in this Article: traditional public and charters. While other schools, including religious, parochial, and independent schools, may receive limited federal funding, see *infra* Part III, or state funding via vouchers, see *infra* Part IV.E, I define a "private" school as one that receives a substantial majority of its funding from non-government sources.

Fifth, "sex-segregated charters" signifies charters whose activities are entirely sex-segregated. As of July 2009, nearly twenty percent of publicly funded sex-segregated education in the U.S. is sex-segregated according to this definition. Nat'l Assoc. for Single Sex Pub. Educ., <http://www.singlesexschools.org/schools-schools.htm> (last visited July 7, 2009) ("NASSPE") (indicating that "at least 91 of the 540 public schools [offering some type of sex-segregated education] . . . qualify as single-sex schools, meaning that students attending any of those schools have all their school activities — including lunch and all electives — in a setting which is all-boys or all-girls.").

2. CHARTER SCH. INST., STATE UNIV. OF N.Y., FREQUENTLY ASKED QUESTIONS ABOUT CHARTER SCHOOLS, 2.2 (2008)

<http://www.newyorkcharters.org/documents/generalFAQ12-4-07cov.doc> (last visited March 26, 2010). The Charter Schools Institute (SUNY) functions as one of three types of entities created by New York to authorize and oversee charters. The other two are the New York State Board of Regents and certain local boards of education, including New York City and Buffalo. Milton Friedman supported a neoclassical economic philosophy that opposed the then-dominant Keynesian economic model (which asserted that government, rather than free and rationally acting market participants, should direct the allocation of resources and capital); see, e.g., DANIEL YERGIN & JOSEPH STANISLAW, *THE COMMANDING HEIGHTS: THE BATTLE FOR THE WORLD ECONOMY* 128-29 (Simon & Schuster 2002) (1998). Relating Friedman's philosophy to school choice, "[t]he most authoritative proponents of 'educational choice' have relied on the language

which his opponents labeled his policies socialistic,³ while at the U.S. Hispanic Chamber of Commerce (“USHCC”) President Barack Obama embraced the market-based school choice attributed to Friedman and “call[ed] on states to reform their charter rules and lift caps on the number of allowable charter schools, wherever such caps are in place.”⁴ Four broad reasons support why the President chose to highlight charter market expansion at the USHCC. First, Latinos constitute a significant and growing population in urban education.⁵ Second, traditional urban public schools historically have been inferior to non-urban public schools.⁶ Third, many policymakers have advocated charters as potential solutions to the specific problems facing urban public education.⁷ Fourth, chambers of

of economics to account and argue for this shift in policy direction, suggesting that competitive markets ensure that service providers will be more innovative, responsive, and efficient than government ‘monopolies.’” Jeffrey R. Henig et al., *Does Mission Matter, in A GUIDE TO CHARTER SCHOOLS, RESEARCH AND ADVICE FOR EDUCATORS* 130 (Myron S. Kayes & Robert Maranto eds., Rowman & Littlefield Education 1992) (citations omitted). Nobel Prize winning economist Gary Becker indicated that Friedman’s intellectual contributions allowed one to “apply economic analysis to an array of social issues,” and “take markets, rationality and incentives and illuminate issues involving race, education, and the family.” YERGIN & STANISLAW at 129.

3. See ABC News Political Radar Blog, *Palin Invokes Socialism Charge Against Obama*, Oct. 20, 2008, <http://blogs.abcnews.com/politicalradar/2008/10/palin-invokes-s.html> (last visited Mar. 26, 2010) (stating, “Alaska Gov. Sarah Palin continued the Republican ticket’s attempt to tie Sen. Barack Obama to what it calls socialist economic policies”); see also Klaus Marre, *Obama Ridicules Socialism Charge*, THE HILL, Oct. 29, 2008, <http://thehill.com/campaign-2008/obama-ridicules-socialism-charge-2008-10-29.html> (last visited Jul. 5, 2009).

4. See Transcript of Comments, *Obama’s Remarks on Education*, Mar. 10, 2009, <http://blogs.wsj.com/washwire/2009/03/10/obamas-remarks-on-education-2/> (last visited Mar. 26, 2010).

5. See, e.g., Edgar G. Epps, *Race and School Desegregation: Contemporary Legal and Educational Issues* 1 U. PENN. GSE URBAN ED. J. Article 3 (2002) (asserting that “Latino students will soon become the largest non-European racial/ethnic group in the public schools, and like African Americans, they tend to be urban dwellers and disproportionately from lower income families.”) (references omitted); see also Min Zhou, *Urban Education: Challenges in Educating Culturally Diverse Children*, 105 TEACHERS COL. RECORDS 208 (2003).

6. See, e.g., JEANNIE OAKES, *KEEPING TRACK: HOW SCHOOLS STRUCTURE INEQUALITY* 1-39, 261-285 (Yale University Press 2d ed. 2005) (1985); JONATHAN KOZOL, *THE SHAME OF THE NATION: THE RESTORATION OF APARTHEID SCHOOLING IN AMERICA* 1-62 (Crown Publishers 2005).

7. See, e.g., Katherine Santiago, *U.S. Education Secretary to Visit Newark Charter School North Star Academy*, THE STAR-LEDGER, Jun. 5, 2009 (stating that “[i]n New Jersey, as in many states, they [charters] have focused on the most troubled urban neighborhoods, and some have shown great successes.”), available at http://www.nj.com/news/index.ssf/2009/06/us_education_secretary_to_visi.html; see also an example of a charter law favoring urban areas, *infra* note 21.

commerce tend to support market-based solutions. While some people may interpret President Obama's statement to mean that charter rules have not been reformed recently, the U.S. Department of Education ("DOE") materially modified its rules and regulations affecting charters in 2006,⁸ and some states also encouraged meaningful charter innovation in the past several years.⁹ Within his first hundred days after taking office, President Obama executed federal incentives persuading states to develop their charter markets further,¹⁰ and the Senate confirmed Arne Duncan, a supporter of public school innovation that included sex-segregated public schooling, as Secretary of Education.¹¹ These recent events have made rules and regulations more accommodating for charter market expansion and innovation, including for charters that exclusively admit a single sex of students.¹²

Despite a political environment that appears to support the creation of sex-segregated charters, the judicial backdrop affecting them is far more opaque. Only once has the U.S.

8. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 71 Fed. Reg. 62531, 62535, 62540-41 (Oct. 25, 2006) (to be codified at 34 C.F.R. pt. 106) [hereinafter *2006 DOE Regulations*].

9. For example, in 2008, Delaware amended its charter laws to permit sex-segregated education. See *infra* note 45.

10. See, e.g., Gintautas Dumcius, *Menino Makes Pitch for More Charter Schools*, DORCHESTER REPORTER, July 22, 2009, available at <http://www.dotnews.com/2009/menino-makes-pitch-more-charter-schools> (stating that Boston Teachers Union President Richard Stutman accused Boston Mayor Thomas Menino of changing his position to favor charters in part due to "the federal government's dangling of \$5 billion in incentives for loosening charter school regulations."); see also H.R. Con. Res. 1, 111th Cong. (2009) (enacted) [hereinafter *American Recovery and Reinvestment Act*].

11. *Obama Taps Arne Duncan for Secretary of ED [sic]*, ESCHOOLNEWS, Dec. 16, 2008, <http://www.eschoolnews.com/2008/12/16/obama-taps-arne-duncan-for-secretary-of-ed/> (last visited Apr. 1, 2010) (stating that as CEO of Chicago's Public Schools,

Duncan . . . discussed the launch of several non-traditional . . . schools, including . . . single-sex . . . schools. Bringing specialized schools to Chicago, Duncan said, would cater to students' varied abilities and interests . . . [W]e know that not every child learns the same way . . . [s]ome children learn better in a classroom surrounded by all boys or all girls.).

See also, Editorial, *Arne Duncan: A Reformer as U.S. Education Secretary*, SEATTLE TIMES, Dec. 17, 2008, available at http://seattletimes.nwsources.com/html/editorialsopinion/2008532391_edit18educa.html (describing Duncan as an urban public school superintendent who historically supported charters).

12. Over the past fifteen years, educational entrepreneurs created approximately 3,000 new charters. See U.S. Charter Schools, About the Charter School Movement, http://www.uscharterschools.org/pub/uscsc_docs/o/movement.htm (last visited Aug. 3, 2009); see also Delaware's 2008 changes, *infra* note 45.

Supreme Court decided a case that classified primary and secondary (“K-12”) public school students based on sex, and that ruling was made by an equally divided Court, without any published opinion.¹³ The district court in that case indicated that analyzing sex-based classifications in K-12 public schools was a new and “unchartered territory.”¹⁴ Since that time, however, not only has the Court failed to rule on sex-based classifications in K-12 public schools in general, but it also has provided convoluted guidance on K-12 market-based choice schools and K-12 school segregation¹⁵ that otherwise could have been helpful in creating and assessing the constitutionality of sex-segregated charters.

Due to the recent growth in sex-segregated charters, the welcoming political landscape that currently encourages their creation, and the lack of direction by the Supreme Court, this Article explores what happens when market competition and choice — generally regarded as innocuous principles supported by many individuals across the U.S. political spectrum¹⁶ — are (a) applied to education, (b) combined with empirical evidence of charter success in educating urban students, and (c) mixed with policy arguments that form the basis of sex-segregated charters.¹⁷ By attempting to navigate the scant potentially relevant guidance from the Court, the Article analyzes how sex-segregated charters, including those expressly authorized

13. *Vorchheimer v. Sch. Dist. of Philadelphia*, 430 U.S. 703 (1977).

14. *Vorchheimer v. Sch. Dist. of Philadelphia*, 400 F. Supp. 326, 335 (E.D. Pa. 1975), *rev’d*, 532 F.2d 880 (3rd Cir. 1976), *aff’d by an equally divided court*, 430 U.S. 703 (1977).

15. Despite turnover among the Court’s members, including its Chief Justice, the Court’s two most recent cases involving the constitutionality of K-12 school choice programs and segregation were both 5-4 decisions in which the justices issued an unusually high six opinions per case. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007); *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002); *see discussion infra* Part IV.E-F.

16. *See, e.g.*, GARY MIRON & CHRISTOPHER NELSON, WHAT’S PUBLIC ABOUT CHARTER SCHOOLS? LESSONS LEARNED ABOUT CHOICE AND ACCOUNTABILITY 2 (Corwin Press 2002) (stating that charters are supported by both liberals and conservatives, and asserting that because “the charter concept is so politically ambidextrous [it] has contributed, no doubt, to the movement’s impressive growth over the past decade.”); *see also Sharpton, Gingrich, Duncan Team Up on School Reform*, USA TODAY, Aug. 14, 2009, http://www.usatoday.com/news/education/2009-08-14-sharpton-gingrich_N.htm?csp=34 (last visited Aug. 15, 2009) (indicating that former Republican Speaker of the House of Representatives, Newt Gingrich “applauded Obama for showing ‘real courage on the issue of charter schools.’”).

17. *See infra* Part V.A.

by state legislatures, may comport with Title IX of the Patsy Takemoto Mink Equal Opportunity in Education Act¹⁸ and the Equal Protection Clause of the U.S. Constitution.¹⁹ The Article concludes that despite the ostensibly benevolent goals of the educational entrepreneurs that create charters, many sex-segregated charters violate the law.

Part II provides a general history of the educational inequality and market-based theories that helped lead to the public school reform movement and the creation of charters, particularly in urban areas. This Part articulates what constitutes a charter and provides examples of various flavors of innovative charters and charter-enabling legislation, including laws sanctioning sex-segregated charters. I argue that successful charters prosper not only due to market mechanisms but also because of stakeholder²⁰ buy-in and the implementation of recognized organizational structure theory. This Part also asserts that because charters often have been created to benefit urban students²¹ who have historically been subjected to inferior public education in the U.S.,²² expanded

18. 20 U.S.C. § 1681 (2009) [hereinafter *Title IX*].

19. U.S. CONST. amend. XIV, § 1.

20. No generally accepted definition exists for public education stakeholders. Stacey M. Childress and Allen S. Grossman of Harvard Business School stated that stakeholders were “people and groups inside and outside the organization who have a legitimate interest in the system and can influence the effectiveness of the strategy. These include teachers, principals and their unions, parents, school boards, community and advocacy groups, and local politicians and policymakers, among others.” Mallory Stark, *Public Education Goes to School*, HARV. BUS. SCH. WORKING KNOWLEDGE (Dec. 19, 2005). The Texas Public Education Information Resource indicated that stakeholders in public education included “administrators, educators, state leadership, researchers, and professional organizations” Texas P-16 Public Education Information Resource, <http://www.texaseducationinfo.org/tpeir/> (last visited Aug. 3, 2009). The title of Edie L. Holcomb’s book argues for another meaningful stakeholder in public education: STUDENTS ARE STAKEHOLDERS, TOOL: INCLUDING EVERY VOICE IN AUTHENTIC HIGH SCHOOL REFORM (Corwin Press 2007).

21. See, e.g., Missouri’s requirement that “[c]harter schools may be operated only in a metropolitan school district or in an urban school district containing most or all of a city with a population greater than three hundred fifty thousand inhabitants” MO. REV. STAT. § 160.400.2 (2008).

22. See generally Beth C. Rubin, et al., *Structuring Inequality at Berkeley High, in UNFINISHED BUSINESS: CLOSING THE RACIAL ACHIEVEMENT GAP IN OUR SCHOOLS* 29-86 (Pedro Noguera & Jean Yonemura Wing, eds., Jossey-Bass Publisher 2006); KOZOL, *supra* note 6; PEDRO NOGUERA, *CITY SCHOOLS AND THE AMERICAN DREAM* 82-102 (Teachers College Press 2003); Dorothy Shipps, *The Businessman’s Educator: Mayoral Takeover and Nontraditional Leadership in Chicago*, in *POWERFUL REFORMS WITH SHALLOW ROOTS: IMPROVING AMERICA’S URBAN SCHOOLS* 16-37 (Larry Cuban & Michael Usdan, eds., Teachers College Press 2003) (asserting that urban and minority students overwhelmingly have received inferior public educations to students at non-

charter innovation may help shrink the achievement gap that exists in urban public education.²³ As a result, charter caps arguably deny access to a better education for hundreds of thousands of mostly urban students²⁴ — the students with the least relative social capital²⁵ to spend in an educational marketplace. I maintain that while de jure charter caps may not be the pressing hobgoblin that some people assert, legislators and entrepreneurs should continue expanding the number of charters into a larger and less illiquid market, creating a more efficient public school landscape.

Part III considers Title IX as it applies to schools that admit and administer education solely to students of a specific sex to the exclusion of the other sex. A combination of the latest re-authorization of the Elementary and Secondary Education Act²⁶ (currently known as the “No Child Left Behind Act”²⁷ (“NCLB”)) and the 2006 DOE Regulations encouraged the development of sex-segregated charters and raised questions about these schools’ constitutionality. Based on legislative and judicial history, this Part addresses the viability of sex-segregated charters under Title IX.

Part IV discusses the judicial underpinnings that potentially relate to sex-segregated charters. Here, I review the development of the intermediate level of scrutiny that courts apply to sex-based government classifications as well as the heightened tests that courts use in the context of public education. I argue that while charters are schools of choice, the Court’s recent private choice doctrine is irrelevant to charters; the Court’s guidance in K-12 racial segregation, however, may help to frame part of an understandable analytic for the

urban public schools).

23. While I use the term “achievement gap,” Gloria Ladson-Billings instead refers to an “education debt” that “comprises historical, economic, sociopolitical, and moral components” that are analogous “with the concept of national debt.” Gloria Ladson-Billings, *From the Achievement Gap to the Education Debt: Understanding Achievement in U.S. Schools*, 35 EDUC. RESEARCHER 3 (2006).

24. See, Editorial, *Blackboard Pulpit, Encouraging the Spread of Charter Schools*, WASH. POST, Jun. 22, 2009 at A14 (stating that “[a]n estimated 365,000 students are on waiting lists to get into charter schools.”).

25. See James S. Coleman, *Social Capital in the Creation of Human Capital, Supplement: Organizations and Institutions: Sociological and Economic Approaches to the Analysis of Social Structure*, 94 AM. J. SOC. S95 (1988).

26. 20 U.S.C. § 3381 (1965) [hereinafter *ESEA*]. The ESEA was originally authorized until 1970 but has been reauthorized to the present in various forms.

27. 20 U.S.C. § 6301 (2001).

constitutionality of sex-segregated charters.

Because so many variations of charters and charter laws exist, examining more than one of them is beyond the scope of this Article. Part V investigates one example of the constitutionality of sex-segregated charters in an application approved by New York in June 2009. New York provides a compelling study because its legislature authorized the creation of sex-segregated charters, sex-segregated charters currently operate there, and the state is transparent in its objectives and interests for approving and funding sex-segregated charters. This Part applies the Court's potentially applicable tests to this charter application approval and evaluates whether any of the Court's safe harbors for sex-based government classifications may be relevant to the charter application.

The Article closes by recognizing that market mechanisms, organizational architectures, and stakeholder buy-in are the three essential features of charter success. It acknowledges that charters can be valuable tools in the struggle to improve urban public education. But while strong policy arguments and substantiated results favor continued charter evolution, insufficient evidence exists for many sex-segregated charters, as currently constituted, to pass legal scrutiny. I conclude that the three essential characteristics of charters — not sex-segregation — are what make a measurable difference in improved student achievement. As a result, no exceedingly persuasive justification exists for states to maintain most sex-segregated charters. To have any meaningful chance of surviving Title IX and Equal Protection Clause challenges, sex-segregated charter legislation, applications, and charter documents must employ specific language that the Court has indicated may survive constitutional scrutiny. Using such precise diction in hopes of passing judicial review, however, would likely force the proponents of sex-segregated charters to change the vision and practice of the schools that they wish to create. But without the *de facto* implementation of such wording, sex-segregated charters likely violate Title IX and the Equal Protection Clause.

II. EVERYTHING YOU WANTED TO KNOW ABOUT CHARTERS BUT WERE AFRAID TO ASK

A. How Were Charters Born?

The origins of educational reform that led to today's school choice trace back to the works of Gunnar Myrdal and Milton Friedman, two influential economists holding diametrically opposing views.²⁸ First, the 1944 publication of Gunnar Myrdal's poignant report, *An American Dilemma: The Negro Problem and Modern Democracy*,²⁹ led to its ultimate citation by the U.S. Supreme Court in the 1954 germinal desegregation case, *Brown v. Board of Education*.³⁰ The year following *Brown*, Milton Friedman advocated the concept of public school choice and asserted that breaking the monopoly of the traditional public schools and providing parents with options would lead to an improvement in a failing traditional public school system.³¹ Despite Friedman's arguments, states did not implement public school choice, and 1966's "*Coleman Report*"³² and 1983's *A Nation at Risk*³³ continued to evidence a broken traditional public education system. A 1990 Brookings Review article entitled *America's Public Schools: Choice Is a Panacea* became one of the final prominent manifestos prior to the advent of charters.³⁴ *Panacea* predicted that increased spending and other school experiments were "destined to fail" because, first,

28. See Samuel Brittan, *The Not So Noble Nobel Prize*, FINANCIAL TIMES, Dec. 19, 2003, (asserting that structural development economist Gunnar Myrdal, a Nobel Prize recipient, advocated the abolition of the Nobel Prize in economics because the prize had also been awarded to neoclassical libertarian economists such as Friderich von Hayek and Milton Friedman).

29. GUNNAR MYRDAL, *AN AMERICAN DILEMMA: THE NEGRO PROBLEM AND MODERN DEMOCRACY* (Transaction Publishers 1995) (1944).

30. 347 U.S. 483, n.11 (1954) [hereinafter *Brown*].

31. See Milton Friedman, *The Role of Government in Education*, in ECONOMICS AND THE PUBLIC INTEREST 123 (Robert A. Solo ed., Trustees of Rutgers College 1955). While Friedman's specific idea in this text was aimed at choice through vouchers, as noted by the Charter School Institute *supra* note 2, charters are a direct descendant of Friedman's market-based ideas.

32. James S. Coleman, *Equality of Educational Opportunity*, U.S. DEP'T OF HEALTH, EDUC., AND WELFARE 3 (1966).

33. NAT'L COMM'N ON EXCELLENCE IN EDUC., *A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM: A REPORT TO THE NATION AND THE SECRETARY OF EDUCATION* UNITED STATES DEPARTMENT OF EDUCATION (1983).

34. John E. Chubb & Terry M. Moe, *America's Public Schools: Choice Is a Panacea*, 8 BROOKINGS REV. 4-12 (1990) [hereinafter *Panacea*].

institutional reform needed to unleash markets, and then only after markets existed would parental choice within these markets lead to greater student achievement.³⁵ *Panacea* argued “how much students learn is not determined simply by their aptitude or family background . . . but also by how effectively schools are organized.”³⁶

Making the case for educational choice and competition, *Panacea* asserted that

through democratic control and markets . . . American society makes most of its choices on matters of public importance, including education. Public schools are subject to direct control through politics. But not all schools are controlled in this way. Private schools — representing about a fourth of all schools are subject to indirect control through markets.

What difference does it make? Our analysis suggests that the difference is considerable. Schools compete for the support of parents and students, and parents and students are free to choose among schools. The system is built on decentralization, competition, and choice.”

. . .

[B]ureaucratic control . . . [is] simply *unnecessary* for schools whose primary concern is to please their clients.³⁷

In other words, schools in a market based on choice and competition would be incentivized to become the “organizations that academics and reformers would [otherwise] like to impose on the public schools.”³⁸

35. *Id.*

36. *Id.*

37. *Id.* at 6.

38. *Id.* at 5. The educational choice theory was revisited again in 2002, essentially a decade after the birth of charters, and was recaptured in the milieu of charters as follows:

According to the theory, choice improves schools through two distinct mechanisms. The first is through competition. Most charter schools receive the lion's share of their funding through . . . allocations that travel with pupils. If a student chooses to attend a charter school, that school receives a fixed-sum payment [directly from the government]. As a consequence, schools that fail to attract and retain students will, in theory, go out of business. Since charter schools cannot gain a leg up on competitors by lowering their “prices,” they must compete primarily on quality. Thus, the charter concept postulates that, other things equal, competition for students will raise the quality of charter schools and that schools failing to compete on quality will be forced to close.

Second, choice also works through a sorting process. Where there is a wide variety of schools from which to choose, and where each provides a different mix of

After this nearly fifty-year narrative provided by academic research, policy studies, and theorizing, came a counter narrative from influential urban youths within popular culture who screamed for positive change in public education. Perhaps representing a more modern and widely accepted representation of James Baldwin's rage,³⁹ this saga was articulated by Grammy Award winning artists Rage Against the Machine, whose angst at the failure of the monopolistic traditional public education system extant at the time produced a rage that was

relentless/We need a movement with a quickness The present curriculum/I put my fist in 'em/Eurocentric every last one of 'em With lecture I puncture the structure of lies One-sided stories for years and years and years [W]e need to check the interior/Of the system that cares about only one culture/And that is why/We gotta take the power back The teacher stands in front of the class/But the lesson plan he can't recall/The student's eyes don't perceive the lies/Bouncing off every . . . wall Europe ain't my rope to swing on/Can't learn a thing from it/Yet we hang from it Gotta [e]xpose and close the doors on those who try/To strangle and mangle the truth⁴⁰

Using the words and media of popular culture, Rage identified to a broad audience the inequitable power, failed organizational structure, poor pedagogy, inability to shutter abhorrent schools, and factually erroneous⁴¹ and culturally

services, customers will choose the mix of services that best meets their educational preferences. . . Choice advocates also argue that the very act of choice will leave students, parents, and teachers disposed to work harder to support the schools they have chosen.

MIRON & NELSON, *supra* note 16, at 5 (references omitted).

39. Baldwin said: "To be a Negro in this country and to be relatively conscious is to be in a rage almost all the time," and "[e]ducation is indoctrination if you're white — subjugation if you're black." *Nation: Negro Leaders on Violence*, TIME, Aug. 20, 1965, available at <http://www.time.com/time/magazine/article/0,9171,841950,00.html>; see also About.com: Africa-American History, James Baldwin Quotes, http://afroamhistory.about.com/od/jamesbaldwin/a/quotes_baldwin.htm (last visited Aug. 3, 2009). James Baldwin has a traditional public school named after him in New York City that is forty-four percent black and forty-four percent Latino with 2008 test scores below both the district (Geographic District #2) and the state. See Education.com, 2008 Test Scores, James Baldwin School, <http://www.education.com/schoolfinder/us/new-york/new-york/james-baldwin-school/test-results/> (last visited Aug. 3, 2009).

40. RAGE AGAINST THE MACHINE, *Take the Power Back*, on RAGE AGAINST THE MACHINE (Sony Records 1992).

41. For a discussion of some of the "one-sided stories," "lies," and factually

irrelevant curriculum.⁴² These defects not only were mentioned in the above studies, but they also constituted the reality for those individuals who lacked the social capital to choose the provision of their education. Because existing laws prohibited competition within public education, they perpetuated the failings of traditional urban public schools. Charters, which would permit concepts such as culturally relevant schools, could indeed become a “movement with a quickness” in which stakeholders could, in short order, create and attend public schools of their choice. Charters could enable these changes by employing market mechanisms to free legions of stakeholders from the failed traditional urban public schools and to shift the power, structure, curriculum, and pedagogy that continued to exist in traditional public schools in the early 1990s in a different direction.

With these chronicles serving as the historical, theoretical, and emotional underpinnings that preceded meaningful public educational choice and competition, Minnesota, in 1991, became the first state to enact charter-enabling legislation.⁴³ California followed in 1992. Colorado, Georgia, Massachusetts, Michigan, New Mexico, and Wisconsin enabled charters in 1993, and three more states did so in 1994 (Arizona, Hawaii, Kansas). Eight states plus the District added charter legislation in 1995 (Alaska, Arkansas, Delaware, Louisiana, New Hampshire, Rhode Island, Texas, Wyoming), six more states in 1996 (Connecticut, Florida, Illinois, New Jersey, and North and South Carolina), four in 1997 (Mississippi, Nevada, Ohio, Pennsylvania), five in 1998 (Idaho, Missouri, New York, Utah, Virginia), two in 1999 (Oklahoma, Oregon), Indiana in 2001, Iowa and Tennessee in 2002, and Maryland in 2003.⁴⁴ In

erroneous items that have long been a part of the traditional public education system, see, e.g., JAMES W. LOEWEN, *LIES MY TEACHER TOLD ME: EVERYTHING YOUR AMERICAN HISTORY TEXTBOOK GOT WRONG* (Touchstone Publishing 1996); HOWARD ZINN, *A PEOPLES' HISTORY OF THE UNITED STATES* (Harper Perennial Modern Classics 2005).

42. See, e.g., Gloria Ladsen-Billings, *But That's Just Good Teaching! The Case for Culturally Relevant Pedagogy*, 34 *THEORY INTO PRACTICE* 159-65 (Sum. 1995). Culturally relevant schools are discussed in greater detail, *infra* Part II.B.2.

43. See, e.g., FREQUENTLY ASKED QUESTIONS ABOUT CHARTER SCHOOLS, *supra* note 2, at 1.1.

44. See U.S. Charter Schools, State By State #'s, <http://www.uscharterschools.org/cs/sp/query/q/1595?x-order=year,state> (last visited Aug. 3, 2009). By process of elimination, the ten states that prohibit charters are: Maine, Vermont, West Virginia, Kentucky, Montana, North Dakota, South Dakota, Nebraska, Alabama, and Washington.

little more than a decade, year after year, state after state, following generation after generation of studies, discussions, and emotions spurred by the failed monopoly of the traditional public schools, a massive and unprecedented movement had occurred in U.S. public education — in a vast majority of the country, public school choice through charters had become a reality. That reality became diverse, as legislatures took a variety of views on multiple types of charter innovation, including sex-segregated charters.⁴⁵

45. For example, New York, Ohio, and Delaware explicitly permit sex-segregated charters. N.Y. EDUC. LAW § 2854(2) (McKinney 2006) (stating that “nothing in this article shall be construed to prevent the establishment of a single-sex charter school.”); OHIO REV. CODE ANN. § 3314.06 (Anderson 2007) (stating that

[t]he governing authority of each community school established under this chapter shall adopt admission procedures that specify the following: . . . (D)(1) That there will be no discrimination in the admission of students . . . except that

. . . [t]he governing authority may establish single-gender schools . . . provided comparable facilities and learning opportunities are offered for both boys and girls. Such comparable facilities and opportunities may be offered for each sex at separate locations).

Delaware’s recent legislative history may be instructive relative to a state’s view of how the creation of sex-segregated charters comports with governing law. In March 2008, the Chair of Delaware’s State Council of Persons with Disabilities provided a memo to the state’s legislators regarding Delaware’s proposed H.B. 285 concerning single-sex charters. See Memorandum from Ms. Deniese McMullin-Powell, Chairperson, State Council for Persons with Disabilities to All Members of the Delaware State Senate and House of Representatives (Mar. 14, 2008) (stating that in 2007 Delaware’s Department of Education opined that single-sex charters could violate the law but the Chair supported amending state law to authorize single-sex charters). To assuage legal concerns, Delaware’s HB 285 required, *inter alia*, the Delaware DOE to establish a sex-segregated charter for the excluded sex within two years and sunset the sex-segregated school authorization in 2013. Delaware’s legislation was proposed in response to an application to create the “Prestige Academy Charter School,” an all-boys school. The next sex-segregated charter in Delaware must be “substantially equal” to the Prestige school. DEL. H.B. 285 (2008). In April 2008, Delaware Governor Ruth Ann Minner signed the legislation into law, thus authorizing single-sex charters in Delaware, and the Prestige school currently operates. See *Single-Gender Charter Schools Bill Signed*, DEL. NEWS J., Apr. 22, 2008, available at <http://www.delawareonline.com/article/20080422/NEWS03/804220406/Single-gender-charter-schools-bill-signed>

Other states such as Arkansas, Arizona, and Colorado are legislatively silent on the issue. ARK. CODE ANN. § 14.03.250 (Michie 2002); ARIZ. REV. STAT., § 15-184 (2007); COLO. REV. STAT. § 22-30.5-101 (2002).

In contrast, Connecticut appears to frown upon sex-segregated charters. See CONN. GEN. STAT. § 10-16p(f) (2007) (stating that charters are not to

discriminate on the basis of race, color, national origin, gender, sexual orientation, religion, disability, athletic performance or proficiency in the English language, provided the school may limit enrollment to a particular grade level or specialized educational focus and, if there is not space available for all students seeking enrollment, the school may give preference to siblings but shall otherwise determine enrollment by a lottery).

B. So Charters May Exist, but Just What Are They?

A charter school is so-called because a charter document functions as a contract between the state and the school; the charter document provides a description of the educational mission and responsibilities of the newly created publicly financed charter school.⁴⁶ The principal investigator of Harvard's Charter Schools Chartering Practice Project, Katherine K. Merseth, indicated that

[C]harter schools . . . are similar to traditional public schools in several regards: they receive government funds to operate, they may not engage in religious instruction, and they are open to all interested students. These schools are state-level entities created by state legislatures and therefore subject to state level performance requirements, state curricular frameworks, and the federal requirements outlined under NCLB.⁴⁷

1. What Are Charters' Structural Features?

Gary Miron and Christopher Nelson noted that the charter school model contains "a set of policy changes . . . that alter the . . . environment in which charter schools operate. We call these 'structural' changes because they seek to fundamentally alter the conditions under which schools operate."⁴⁸ The organization is "built on decentralization, competition, and choice."⁴⁹ Charters thus created structural change and provided options through competitive market mechanisms to public education stakeholders that previously lacked the social capital to exercise educational choice.

In terms of who may apply for a charter grant, charters distinguish themselves from traditional public schools because

46. See FREQUENTLY ASKED QUESTIONS ABOUT CHARTER SCHOOLS, *supra* note 2, at 1.1.

47. MERSETH *supra* note 1, at 3. See also Jim Stergios, Editorial, *Gov. Behind the Curve*, BOSTON HERALD, Mar. 30, 2009 (stating that a "Boston Foundation report show[ed] that the city's charters, which significantly outperform district and pilot schools and educate a higher percentage of African-Americans than district schools, are bridging the achievement gap," and referencing THE BOSTON FOUNDATION, INFORMING THE DEBATE: COMPARING BOSTON'S CHARTER, PILOT, AND TRADITIONAL SCHOOLS (Jan. 2009), which was researched and prepared by faculty from Duke University, MIT, Harvard, and the University of Michigan).

48. MIRON AND NELSON, *supra* note 16, at 4-5.

49. Chubb and Moe, *supra* note 34, at 5.

often “a group of private individuals may open and govern a charter school, in contrast to traditional schools, which are typically governed by a publicly elected board or by individuals appointed by an elected official.”⁵⁰ If the schools fail to abide by their charter, or if they produce inappropriate results, the state can revoke a school’s charter.⁵¹ Charters provide a swath of structural benefits that traditional public schools have not.⁵² Examples include, *inter alia*, longer school days,⁵³ multi-aged classrooms, strict discipline policies, lower student/teacher ratios,⁵⁴ summer programs, and more individualized student attention by teachers, tutors, and assistants.⁵⁵ As a result, the structural differences that charters provide have not been — and still are not — provided by the traditional urban public schools.⁵⁶ Charters generally have open enrollment and are not

50. MERSETH, *supra* note 1, at 3. Because the actual composition of who may apply for a charter varies from state to state, the U.S. Charter Schools State Information website provides a tool to compare who may submit a charter application in any given state. See US Charter Schools State Information Page, http://www.uscharterschools.org/pub/usc_s_docs/sp/index.htm (last visited Aug. 3, 2009).

51. See, e.g., Andrew Rotherham, *The Pros & Cons of Charter School Closures*, in HOPES, FEARS, & REALITY, A BALANCED LOOK AT AMERICAN CHARTER SCHOOLS IN 2005 43-52 (Robin J. Lake & Paul T. Hill, eds., University of Washington, National Charter School Research Project 2005).

52. For a detailed analysis of some of the structures and systems associated with successful charters and how those structures can be replicated, see MERSETH *supra* note 1, at 171-196 (“Structures and Systems, Getting Organized for Instruction”).

53. See, e.g., THOMAS DOWNES ET AL., INCOMPLETE GRADE: MASSACHUSETTS EDUCATION REFORM AT 15 17 (MassInc. 2009).

54. See, e.g., ARK. DEPT OF EDUC., PUBLIC CHARTER SCHOOLS – FREQUENTLY ASKED QUESTIONS, (Jan. 2008), http://arkansased.org/schools/schools_charter_faq_answers.html (last visited Aug. 3, 2009) (discussing charters’ increased emphasis on citizenship, ethics, and character education). But see OFFICE OF EDUC. RESEARCH & IMPROVEMENT, DEPT OF EDUC., THE STATE OF CHARTER SCHOOLS 2000: FOURTH-YEAR REPORT 17-26 (2000).

55. For example, the MATCH Charter Public High School in Boston requires all students to attend two hours of daily tutoring, and newly admitted MATCH students “attend a summer academy each day for five hours, Monday through Thursday, for five consecutive weeks at . . . MIT, for a total of one hundred hours.” MERSETH, *supra* note 1, at 93, 95, 105.

56. Charter competition has, however, spurred some traditional public districts to lobby for changed laws that would permit traditional public school districts to have some greater structural flexibility. For example, the Boston Public Schools created the Boston Pilot Schools in 1995 “to promote increased choice options within the school district, largely in response to 1993 state legislation creating charter schools.” MASS. DEPT OF ELEMENTARY & SECONDARY EDUC., SCH. REDESIGN, *available at* <http://www.doe.mass.edu/redesign/copilot/guidelines.html?section=all>. Therefore, before any meaningful empirical studies could be issued on the efficacy of Massachusetts charters, the traditional public schools felt enough of a competitive threat by the mere presence of charters that it led to greater choice for Boston

subject to academic or language-based proficiencies.⁵⁷ If at capacity, students wanting to attend charters may be subject to lottery restraints or preferences for existing siblings at the school, “at-risk” students, and students living in the local neighborhood.⁵⁸ Not surprisingly, given the grueling work and extensive hours required of faculty at some charters and the ability to terminate poor teachers quickly,⁵⁹ teachers’ unions have motives to oppose charters.⁶⁰

Charters are funded on per-pupil formulae, with the funds disbursed by the government directly to the charter or Local Education Agency (LEA).⁶¹ If a charter is its own LEA, then it may have “many more programmatic and financial responsibilities than a school that is only a part of an LEA.”⁶² The Center for Education Reform (CER) has indicated that an LEA is required to (1) receive federal education funds, (2) Assure delivery of acceptable services, (3) assure inclusion of all qualified students in funded programs, (4) provide training in compliance with federal laws and regulations, (5) conduct audits of federally funded programs . . . [and] (6) report and

stakeholders.

57. *But see* INFORMING THE DEBATE, *supra* note 47, Table 4, at 16 (suggesting that a significantly smaller percentage of students who were Latino or who had limited English proficiency enrolled in charters or attempted to gain access to charters via a lottery). Anecdotal speculation suggests that dissemination of the charter option may have challenges crossing language barriers. As a result, the number of black students that enroll in charters may be disproportionately high, with the number of Latino students disproportionately low. *Cf.* David R. Garcia, *Academic and Racial Segregation in Charter Schools: Do Parents Sort Students into Specialized Charter Schools?* 40 EDUC. & URBAN SOC. 590 (2008) (suggesting that some parents have chosen to leave more racially integrated district schools to attend more racially segregated charters).

58. *See e.g.*, CONN. GEN. STAT. § 10-66, *supra* note 45.

59. *See* PowerPoint: The National Charter School Research Project, University of Washington’s Center on Reinventing Public Education & The Massachusetts Charter School Dissemination & Replication Project, Harvard Graduate School of Education, *Human Resources & Charter Schools: Hiring, Turnover, & Retention in 7 States*, at Slide 5 (2008) (indicating that charters in Arizona, Texas, California, Rhode Island, Hawaii, and Massachusetts generally have expanded pools of employee candidates, offer a match to compelling missions, provide incentive-based compensation, and dismiss employees for poor performance).

60. *See* Letter from Dennis Van Roekel, President, Nat’l Educ. Assoc. et al., to Ame Duncan, Secretary of Education (Aug. 21, 2009).

61. *See e.g.*, ROBIN JACOBOWITZ & JONATHAN S. GYURKO, CHARTER SCH. FUNDING IN N.Y.: PERSPECTIVES ON PARITY WITH TRADITIONAL PUBLIC SCHOOLS, (Mar. 2004).

62. *See* Primers on Implementing Special Education in Charter Schools, http://www.uscharterschools.org/cs/spedp/view/sped_aud/4?section=stat (last visited Aug. 3, 2009).

respond to state and federal Education Units.”⁶³ Whether a charter is an LEA is state-dependent. In Massachusetts, for example, a charter is treated as its own school district or LEA and maintains its own board.⁶⁴ Colorado, however, defines a charter as a “public, nonsectarian, nonreligious, non-home-based school which operates within a public school district.”⁶⁵ A Colorado charter is, therefore, a public school in the district that grants the charter and is “part of the school district that approves its charter application and charter contract and . . . accountable to the local board of education pursuant to section 22-30.5-104 (2).”⁶⁶ Thus, Colorado charters do not serve as distinct LEAs, they operate within an existing school district, and they answer to that district’s school board.⁶⁷ Further muddying the issue, states such as New York allow charters to be considered either as LEAs or as part of the broader district, depending upon their creation and purpose.⁶⁸ Under many federal guidelines, each LEA has certain obligations. In the twenty-five states where a charter may constitute its own LEA, the CER “believes charters should be their own LEAs,” allowing the charters to “receive federal funds directly,”⁶⁹ rather than having the funds pass “from the federal government to the state to the LEA, and finally to the charter school.”⁷⁰ Alternatively, “[i]n states where charters are not LEAs, the local district may keep a portion of the funding to cover administrative costs, and therefore, the charter school

63. CTR. FOR EDUC. REFORM, WHY CHARTER SCHOOLS SHOULD BE THEIR OWN INDEPENDENT LEA 2 (2008).

64. See MASS. DEPT OF ELEMENTARY AND SECONDARY EDUC., MASSACHUSETTS PRIMER ON SPECIAL EDUCATION AND CHARTER SCHOOLS, § II, Part II, A, 1 (2009).

65. COLO. REV. STAT. § 22-30.5-104(1) (2002) (emphasis added).

66. *Id.* at 105-108(5).

67. Having said this, Colorado charters are, however, ultimately administered by a governing body that is agreed to by *both* the charter applicant and the local school board. *Id.* at 104(4).

68. See, e.g., Jacobowitz & Gyrko *supra* note 61 at n.1 (stating that charters are entitled to “one hundred percent” of the “expense per pupil,” as defined by the Average Operating Expense/Total Allowable Pupil Units, but charters at times do not receive the entirety of the funds due to them). In addition, New York charters became their own LEA for NCLB purposes in 2001 but are within a school district’s LEA for purposes of the Individuals with Disabilities Education Act (“IDEA”). *Id.* at 3, Table 1; see also FREQUENTLY ASKED QUESTIONS ABOUT CHARTER SCHOOLS *supra* note 2 (indicating that local districts can authorize charters in addition to the two state authorizing agencies).

69. CTR. FOR EDUC. REFORM, *supra* note 63.

70. *Id.*

will receive less money.”⁷¹

2. Are Charters Successful, and, if so, Why?

Research shows that charters can be successful relative to the traditional public schools. Several RAND studies published in 2009 suggest that charters had “some positive effect on high school student attainment”⁷² and that charter “high school students had a higher probability of graduating and attending college.”⁷³ Achievement gaps may be tightened by some high performing charters.⁷⁴ As Merseth stated, “[w]hether one applies elements of systems theory, the advice of management gurus, or concepts of organizational congruence, a central element of high-performing organizations . . . evident in these charter schools is the power of coherence.”⁷⁵ Charters function as places where entrepreneurs can create educational models based on business theory, and, if successful in the marketplace and in possession of a desire to do so, charters can become nationally recognized brands.⁷⁶ Nineteen years following the arguments in *Panacea*, Merseth’s and RAND’s contemporary research appears to agree that organizational structures within educational markets can lead to heightened performance via successful charters.⁷⁷ Simply put, established business doctrine and accepted economic theory⁷⁸ support that an educational

71. *Id.* at 3.

72. Susan Bodilly, RAND EDUC., THE ROLE OF CHARTER SCHOOLS IN IMPROVING EDUCATION (2009), available at http://www.rand.org/pubs/research_briefs/RB9428/.

73. Jennifer Li, RAND EDUC., ARE CHARTER SCHOOLS MAKING A DIFFERENCE? A STUDY OF STUDENT OUTCOMES IN EIGHT STATES 1 (2009), available at http://www.rand.org/pubs/research_briefs/RB9433/.

74. See generally MERSETH *supra* note 1; INFORMING THE DEBATE, *supra* note 47.

75. MERSETH, *supra* note 1, at 11. (referencing Deming (2000), Collins (2005), Drucker (1990), Tushman & O’Reilly (2002), and Nadler & Tushman (1980)).

76. An example of a national charter brand is the KIPP brand, which is an acronym for “Knowledge Is Power Program.” Two of KIPP’s founders, Mike Feinberg and David Levin met in the Teach for America program in 1992 and created their own educational model that started in 1994 with a single classroom of 50 students. See, e.g., Stig Leschly, KIPP NATIONAL (A) (ABRIDGED) HARV. BUS. SCH. CASE 9-805-068, at 1-4 (Jan. 13, 2005). As of July 2009, KIPP had 82 schools in 19 states plus the district, with approximately 20,000 students. See KIPP: Knowledge Is Power Program website, <http://www.kipp.org/> (last visited July 18, 2009).

77. Unlike the predictions in *Panacea*, however, Merseth appears to have argued that the micro, more than the macro, organization constitutes a proximate cause of successful urban charters. See MERSETH *supra* note 1; *Panacea supra* note 34.

78. See, e.g., JAMES A. BRICKLEY ET AL., MANAGERIAL ECONOMICS & ORGANIZATIONAL ARCHITECTURE 280-505, 599-698 (McGraw-Hill Irwin 4th ed. 2007).

provider's organizational structure can lead to measurable differences in students' educational outcomes.

Specific examples of market-based structural and organizational innovation among charters include schools whose curricula focus on the performing arts,⁷⁹ business and finance,⁸⁰ math and science,⁸¹ science and technology,⁸² and the arts in general.⁸³ Other charters are more overtly cultural in their curricular missions. For example, the Academy of the Pacific Rim Charter Public School in Hyde Park, Massachusetts, focuses on fusing Asian and Western cultures.⁸⁴ Other charters highlight American Indian culture,⁸⁵ while a number of charters are centered on African culture.⁸⁶ While culturally conscious in their missions, these schools do not restrict student admissions based on the school's particular cultural consciousness. If a parent would like his or her child to attend that charter, and if sufficient seats exist or,

79. See, e.g., Sequoia Choice - Star Performing Arts Charter in Arizona <http://sequoia.choiceed.org> (last visited Mar. 26, 2010).

80. See, e.g., Pillar Academy of Business & Finance in Arizona, <http://www.pillaracademy.com/> (last visited Mar. 26, 2010).

81. See, e.g., Math and Science Success Academy in Arizona, http://www.amstucson.org/MASSA_info.htm (last visited Mar. 26, 2010).

82. See, e.g., Arizona Academy of Science and Technology, www.arizonaacademyofscience.org (last visited Mar. 26, 2010).

83. See, e.g., Arizona School for the Arts, <http://goasa.org/index.cfm> (last visited Mar. 26, 2010).

84. See Academy of the Pacific Rim, http://www.pacrim.org/our_story.htm (last visited Aug. 4, 2009).

85. See, e.g., Brian Bielenberg, *Charter Schools for American Indians*, in *LEARN IN BEAUTY: INDIGENOUS EDUCATION FOR A NEW CENTURY* 132-151 (Jon Reyhner et al. eds., Northern Arizona University 2000).

86. See, e.g., Roots Public Charter School in Washington, D.C., (stating that [t]he Mission of Roots Public Charter School is to: Promote and secure the connection of Mother Africa within our children; Prepare students to break the chains of psychological conditioning that attempt to keep them powerless in all phases of society; Provide students with a strong African-centered learning environment; Guide students toward academic excellence, exemplary character and social responsibility; Encourage success leading to self-reliance and economic, social/political contributions to society.)
 Roots Public Charter School Mission and Philosophy, http://www.rootspcs.org/School_Philosophy__Mission/school_philosophy__mission.html (last visited Aug. 3, 2009); the Joseph Little-Nguzo Saba Charter School in West Palm Beach Florida (indicating that "[o]ur mission is to provide a nurturing and caring environment where at risk children can learn and be successful through a program of strong academics, high expectations, values and character building skills that are based on African culture and tradition"), Mission Statement, Joseph-Nguzo Saba Charter School, <http://www.jlncs.org/index.php> (last visited Aug. 3, 2009).

alternatively, if that student wins a lottery,⁸⁷ then that student may attend that school and learn based on the cultural missions of these schools, regardless of the student's cultural background.⁸⁸ Having stakeholders, including students, buy into the schools' desire for stakeholder involvement is an essential element in erasing many of the tensions and failures that have plagued urban public education.⁸⁹ Unlike traditional public schools, because charters are schools of choice, charters invite stakeholder buy-in.

As a result, charter success appears to stem from three overarching factors: (1) a market that allows for choice and competition, (2) organizational structures that permit for coherence without bureaucracy, and (3) buy-in by stakeholders into a given charter's specific model, including a charter's specific curricular and pedagogical approach. These three reasons have tremendously affected student achievement, particularly with historically underachieving traditional urban public schools and their students.

3. *What Do Charter Caps Mean?*

Despite evidence of charter success, restrictions such as charter caps, which inhibit new charters from forming, arguably prevent a variety of potentially interested stakeholders from entering the educational marketplace.⁹⁰ As with all things charter, the rules limiting the number of charters in a given jurisdiction are a creation of state law, and their existence has become a contentious issue in recent years. In 2005, Christiansen and Lake asserted that the variation of the number of new charter schools "among the states can be explained by restrictive laws and caps,"⁹¹ and by 2009, sixty-

87. See, e.g., CONN. GEN. STAT. § 10-66 (2007), *supra* note 45.

88. For example, despite a mission to fuse Asian and Western cultures, the Academy of the Pacific Rim's student population is 57 percent black, 23 percent white, 16 percent Latino and three percent Asian. MERSETH *supra* note 1, at 73.

89. See, e.g., Jeff Duncan-Andrade, *Gangstas, Wankstas, and Ridaz: Defining, Developing, and Supporting Effective Teachers in Urban Schools*, 20 INT'L J. OF QUALITATIVE STUD. IN EDUC., 617 (2007). See also GASTON ALONSO ET AL., *OUR SCHOOLS SUCK: STUDENTS TALK BACK TO A SEGREGATED NATION ON THE FAILURES OF URBAN EDUCATION* 71-112 (New York University Press 2009) (indicating generally that effective urban educators must get students to buy-into that educator's authenticity, some of which can be accomplished by having the educators openly accountable to students).

90. See, e.g., DOWNES, *supra* note 53.

91. Jon Christensen & Robin J. Lake. *The National Charter School Landscape in*

five percent of the states that had charter-enabling legislation maintained artificial caps on the number of charters.⁹² The National Charter School Research Project argued for lifting charter caps, asserting not only that room existed “for just 725 more [charter] schools nationwide”⁹³ but also that charter waiting lists in states such as New York were part of the nationwide problem that required charter caps to be lifted.⁹⁴ These assertions are inaccurate, however. The first statement is logically impossible, given that a number of states, including Pennsylvania and Minnesota, have no charter caps.⁹⁵ As a result, room exists for countless more charters on a national basis. Moreover, the second assertion is flawed because New York has not yet hit its cap; in fact, the state authorized a new sex-segregated charter in June 2009 that is the subject of the below analysis in Part IV.A.⁹⁶

Regardless of whether the number of charters in an area is at or below a cap, *de jure* charter caps indeed exist, and they vary in number and rationale by state. For example, while New York’s legislation limits the formation of new charters, an unlimited number of existing public schools may convert to charters.⁹⁷ In Arkansas, a similarly unlimited number of conversions may take place, but new KIPP schools⁹⁸ are explicitly excluded from the cap on new charters, a provision unavailable to KIPP’s competing educational entrepreneurs who thereby are restricted from creating new charters.⁹⁹ Beyond these *de jure* caps, some states arguably have *de facto* caps because the charter approval rests in the hands of the

2007 in HOPES, FEARS, & REALITY: A BALANCED LOOK AT AMERICAN CHARTER SCHOOLS IN 2007 4 (Robin J. Lake ed., Nat’l Charter Sch. Res. Project, Ctr. on Reinventing Pub. Educ. 2007).

92. See Editorial, *Blackboard Pulpit: Encouraging the Spread of Charter Schools*, WASH. POST, June 22, 2009. Even including the district in the equation as not having a charter cap, the figure remains over sixty-three percent.

93. Christensen & Lake, *supra* note 91 at 1.

94. See, e.g., National Alliance for Public Charter Schools, Caps on Charter Schools, <http://www.publiccharters.org/node/45> (last visited Aug. 3, 2009).

95. See, e.g., National Alliance for Public Charter Schools, Caps on Charter Schools, <http://www.publiccharters.org/node/45> (last visited Aug. 3, 2009).

96. See CHARTER SCHOOLS INSTITUTE, THE STATE UNIVERSITY OF N.Y., SUNY AUTHORIZED CHARTER SCHOOLS PERCENT AT PROFICIENCY AS COMPARED TO THE DISTRICT (Jun. 12, 2009), *infra* Part V.A.

97. N.Y. EDUC. LAW § 2852(9) (2006).

98. See discussion of KIPP schools’ growth, *supra* note 76.

99. See, e.g., Indiana and New Hampshire (unlimited only if sponsored by local school boards); Iowa (one charter per district).

local district, many of whose teachers may be opposed to the formation of a competing school.¹⁰⁰ Charter caps, according to some individuals, are often in place due to the political influence of the teachers' unions in traditional public schools.¹⁰¹ Teachers' unions arguably oppose charters because "[g]iven their self-protective instinct, the teachers unions remain staunchly opposed to more charters . . . [because charters] are not automatically unionized. Further, some embrace merit pay, another union *bête noire*, and charter teachers often work longer days than those in the traditional public schools."¹⁰² In June 2009, the *Boston Globe* indicated that Secretary Duncan was "no fan of the artificial caps that limit the ability of new charter schools to open in urban areas where they are most needed."¹⁰³

Whether due to caps or because of some other reason(s), the number of charter schools in operation today is insufficient for the current demand. As of mid-2009, waiting lists held an estimated 365,000 students wanting but unable to be admitted to charters.¹⁰⁴ This figure indicates that the charter market currently is insufficiently large and in need of expansion. Building on the economic principles that provided the foundation for the charter competition concept,¹⁰⁵ charters currently exist in a market that is "illiquid."¹⁰⁶ When a market is illiquid, its participants are unable to recognize an asset's true or "intrinsic" value.¹⁰⁷ Before realizing an asset's intrinsic

100. See, e.g., Scot Lehigh, Op-Ed., *A Brave Call for Raising Charter Caps*, BOSTON GLOBE, May 29, 2009.

101. *Id.*

102. *Id.*

103. Editorial, *Take Caps Off Charter Schools*, BOSTON GLOBE, Jun. 10, 2009; see also Dumicus, *supra* note 10.

104. See *Blackboard Pulpit*, *supra* note 92.

105. See CHARTER SCH. INST., STATE UNIV. OF N.Y., FREQUENTLY ASKED QUESTIONS ABOUT CHARTER SCHOOLS, 2.2 (2006), *supra* note 2.

106. James Forman, Jr. indicated that charters existed in a "quasi-market." James Forman, Jr., *Do Charter Schools Threaten Public Education? Emerging Evidence from Fifteen Years of a Quasi-Market for Schooling*, 2007 U. ILL. L. REV. 839, (2007) see also John Krainer & Stephen F. LeRoy, *Equilibrium Valuation of Illiquid Assets* 19 J. OF ECON. THEORY 223, 223 – 227 (2002) (stating that "immediate completion of transactions in illiquid markets either is impossible or is attainable only on disadvantageous terms" and also referencing other definitions of illiquid markets).

107. See generally Gunnar Myrdal, *A Note on "Accounting Prices" and the Role of the Price Mechanism in Planning for Development*, 68 SWEDISH J. OF ECON. 135, 140 (1966) (stating that "[i]ntrinsic value" is . . . defined as the price that would equate the supply and demand for a particular factor or good, if full 'equilibrium' prevailed. Equilibrium presupposes a perfect . . . market for that factor or good.").

value, participants in illiquid markets often benefit from exercising patience and waiting until opportunistic sub-markets develop.¹⁰⁸ As opposed to these illiquid markets, few, if any, stakeholders in urban public education markets get paid for patience; rather, maintaining the status quo materially impairs them, differentiating the charter market from other economic markets. Nonetheless, the number of students attending charters theoretically should signal to the market at least part of a charter's value relative to other options. But because of the charter market's current illiquidity, stakeholders receive an inadequate number of signals, which hinders stakeholders' ability to ascertain a charter's relative value in the greater public education marketplace. Developed charter markets would increase the quality of signals sent to stakeholders and provide additional information as to a charter's intrinsic value. President Obama and Secretary Duncan appear to recognize that the good in expanding the current charter marketplace. Secretary Duncan explained that "the distribution of Race to the Top funds — an incentive grant program created by the American Recovery and Reinvestment Act — will include preference to states that . . . agree to lift any existing charter school caps."¹⁰⁹ The federal government, therefore, is providing billions of dollars in financial incentives for states to remove charter caps and enlarge the charter marketplace. This inducement to expand charter markets combined with existing consistent growth in sex-segregated charters likely will lead to the formation of additional sex-segregated charters and generate a variety of legal challenges.

III. TITLE IX AND SEX-SEGREGATED CHARTERS

Title IX states: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial

108. See generally Nils H. Hakansson, *An Induced Theory of the Firm Under Risk: The Pure Mutual Fund*, 5 J. OF FIN. & QUANT. ANALYSIS 178 (1970).

109. See Jennifer Cohen, *Education Secretary Duncan Speaks on the Education Agenda*, The New America Foundation Ed Money Watch Blog, <http://www.newamerica.net/blog/ed-money-watch/2009/education-secretary-duncan-speaks-education-agenda-11948> (last visited May 21, 2009).

assistance.”¹¹⁰ Thus, if a school receives funding from any federal agency, the school cannot exclude students from any educational program or activity based on that student’s sex, without a safe harbor provision elsewhere in the legislation.¹¹¹ Title IX has not been materially amended since its inception in 1972.¹¹² Applying Title IX to sex-segregated charters is challenging due to the lack of clarity in the statute’s language, legislative history, and judicial interpretation. While admissions policies that segregate students based on sex at non-vocational public schools may ostensibly appear to be exempted from Title IX’s applicability,¹¹³ at least one federal court has indicated that

The limitation on Title IX’s applicability to admissions policies of public elementary and secondary schools was added to the Senate version of the bill immediately prior to its passage. A House Amendment to the Senate version explicitly covered the admissions policies of such schools, requiring that they convert to coed status within seven years of the bill’s passage. The conference committee considering these provisions adopted the Senate version which according to [Indiana] Senator [Birch] Bayh was intended to allow continued single sex admissions by existing institutions.”¹¹⁴

In addition to relying on Senator Bayh, the *Garrett* court stated that regardless of whether Title IX exempted admissions denials by non-vocational sex-segregated schools, the statute still did not preclude protections of benefits and services based on students’ sex.¹¹⁵ Practically speaking, the district court thus indicated that schools would not be able to segregate students based on sex, regardless of an admissions clause that courts can read narrowly.

To avoid a *Garrett*-like problem in the future, a provision in

110. 20 U.S.C. § 1681(a) (2006).

111. These exceptions include, for example, religious schools and the YMCA. See generally 20 U.S.C. § 1681(a)(3)(2006), 1681(a)(6)(B) (2006).

112. See amendments to Title IX, Aug. 21, 1974, subsection (a)(4), (a)(5), and ¶ (6); Oct. 12, 1976, subsection (a)(5), and ¶¶ (6)-(9).

113. Title IX applies only to admissions policies at “institutions of vocational education, professional education, and graduate higher education and to public institutions of undergraduate higher education. 20 U.S.C. § 1681(a). As a result, this language ostensibly appears to exempt sex-segregated admissions policies at non-vocational public schools from Title IX’s coverage.

114. *Garrett v. Bd. of Educ. of Detroit*, 775 F. Supp. 1004, 1009 n.8 (E.D. Mich. 1991) (referencing Sen. Rep. 92-604; see also discussion of *Garrett*, *infra* Part IV.C).

115. *Id.* at 1009.

NCLB stated that federal funds may be available to LEAs for “innovative assistance programs,” including, *inter alia*, “[p]rograms to provide same-gender schools and classrooms (consistent with applicable law).”¹¹⁶ NCLB required the DOE to issue guidelines relative to LEAs attempting to receive funding for sex-segregated schools and classrooms within 120 days of NCLB’s passage.¹¹⁷ The DOE obliged by indicating that it “intended to propose amendments” to its regulations implementing Title IX.¹¹⁸ The DOE proposed its amendments in 2004,¹¹⁹ and following a notice and comment period, the DOE published its amended regulations to Title IX in 2006.¹²⁰ A federal district court relied on two DOE Office for Civil Rights (“OCR”) rulings that negated sex-segregated public

116. 20 U.S.C. § 7215(a)(23) (2009) (emphasis added). When NCLB was enacted, “applicable law” included the U.S. Constitution, and when Congress passed NCLB, “applicable law” included, *inter alia*, Title IX. The original language proposed for this section by Senator Kay Bailey Hutchinson used a “comparability” standard, rather than a “substantial equality” standard. Attorneys at the National Women’s Law Center (“NWLC”), a supporter of sex-segregated schooling, opposed the comparability standard, because they believed that it retreated from the “substantial equality” standard set forth in *United States v. Virginia* (“*VMI*”), 518 U.S. 515, 554 (1996) (discussed *infra* Part II.D.) and *Sweat v. Painter*, 339 U.S. 629, 633 (1950). See Rosemary Salamone, *The Legality of Single-Sex Education in the United States: Sometimes “Equal” Means “Different,”* in GENDER POL’Y & PRACT. 65 (Amanda Datnow & Lee Hubbard eds. (2002)). Leslie Annexstein, senior counsel for the NWLC, stated that using the word “comparable” would change the legal standard and turn the clock back to the time when boys had better schools than girls[,]” because in *VMI* both the district and appeals courts found Virginia’s proposed separate all-female academy to be “substantially comparable,” and thus constitutional. See, e.g., Cindy Richards, *Public Funds for Experimental Single-Sex Ed?*, WOMEN’S ENEWS, June 29, 2000, available at <http://www.womensenews.org/article.cfm/dyn/aid/160/context/archive.>; Discussion of *VMI*, *infra* Part II.D.

117. 20 U.S.C. § 7215(c) (2009).

118. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 67 Fed. Reg. 31097, 31098 (proposed May 8, 2002) (intending that they be codified at 34 C.F.R. pt. 106).

119. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 69 Fed. Reg. 11275, 11277-11279 (proposed Mar. 9, 2004) (intending that they be codified at 34 C.F.R. pt. 106).

120. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 71 Fed. Reg. 62529, 62530 (ultimately codified at 34 C.F.R. pt. 106). The DOE noted that

Because the scope of the Title IX statute differs from the scope of the Equal Protection Clause, *these regulations do not regulate or implement constitutional requirements* or constitute advice about the U.S. Constitution. Rather, they implement Title IX Recipients may wish to consult legal counsel regarding how the Equal Protection Clause . . . may affect any particular single-sex school

. . . .

71 Fed. Reg. 62533 (emphasis added).

schools;¹²¹ however those OCR rulings were issued prior to the 2006 DOE Regulations.¹²² The OCR would likely not arrive at a similar interpretation under the 2006 DOE Regulations, because they provide that only charters that fail to operate as a single-school LEA must give students of the excluded sex a “substantially equal single-sex school or coeducational school.”¹²³ Single-school LEA sex-segregated charters are, therefore, immune from providing a substantially equal education to the excluded sex under the 2006 DOE Regulations.

Taking the case of a charter that is not a single-school LEA and given the varied characteristics that make charters unique, imagining how a sex-segregated charter would be substantially equal to a coeducational school in the same LEA is challenging. The single-school LEA distinction is particularly critical in states that are already charter-capped or where the broader LEA provides no other sex-segregated option. Under some states’ charter-enabling legislation,¹²⁴ certain sex-segregated charters may violate the second safe harbor qualification relative to Title IX sex-segregated admissions, because the charter-enabling legislation in those states does not consider a charter to be a single-school LEA. Instead, these charters operate under state law within an existing local school district and not as a single district LEA under state law.¹²⁵ Because charter legislation in those states does not consider charters to be single district LEAs, these charters are part of the greater local district and appear to violate Title IX as interpreted by the DOE 2006 Regulations. Further, while the DOE altered its Title IX regulations in response to NCLB, Title

121. *Garrett v. Bd. of Educ. of Detroit*, 775 F. Supp. 1004, at 1010 n. 9 (E.D. Mich. 1991).

122. *Id.*

123. C.F.R. § 106.34(c)(1)-(2) (2005); “A nonvocational public charter school that is a single-school local educational agency under State law may be operated as a single-sex charter school without regard to the requirements in paragraph (c)(1) of this section.” In determining “substantial equality,” for charters that are not their own LEA, the DOE will consider “the policies and criteria of admission, the educational benefits provided, including the quality, range, and content of curriculum and other services and the quality and availability of books, instructional materials, and technology, the qualifications of faculty and staff, geographic accessibility, the quality, accessibility, and availability of facilities and resources provided to the class, and intangible features, such as reputation of faculty.” *Id.* at 106.3(b)(3).

124. See, e.g., *supra* Part II.B.1; Colorado, *supra* notes 65-67.

125. *Id.*

IX required *each* U.S. government agency that provides financial assistance to schools to maintain rules or regulations interpreting that agency's application of Title IX.¹²⁶ Seizing on this inconsistency, a recent federal district court complaint noted that a number of U.S. government agencies that grant financial assistance to educational service providers never modified their existing Title IX regulations, including the Department of Health and Human Services¹²⁷ (providing head start funding) and the Department of Agriculture¹²⁸ (providing free and reduced school lunches).¹²⁹

So what does Title IX mean besides confusion for sex-segregated charters? First, judicial and regulatory interpretation to date indicate that charters should probably avoid relying on the literal text of Title IX and should not assume that their admissions policies will insulate them from adhering to Title IX merely because the charter is non-vocational. Second, sex-segregated charters should understand their position as an LEA under state law, and those charters that are not single-school LEAs must provide a substantially equivalent education to the excluded sex. Third, even if a

126. 20 U.S.C. § 1682 (2009).

127. *A.N.A. v. United States*, No. 3:08-cv-00004-CRS (W.D. Ky. filed May 19, 2008). In addition, 45 C.F.R. § 86.34 generally states that "a recipient shall not provide any course or otherwise carry out any of its education program or activity separately on the basis of sex, or require or refuse participation therein by any of its students on such basis."

128. See 7 C.F.R. § 15a.34, which indicates that "a recipient shall not provide any course or otherwise carry out any of its education program or activity separately on the basis of sex, or require or refuse participation therein by any of its students on such basis."

129. Representing the plaintiffs in *A.N.A.*, the ACLU also identified the Department of Homeland Security, the U.S. Nuclear Regulatory Commission, the U.S. Department of Energy, the U.S. Small Business Administration, the National Aeronautics and Space Administration, the U.S. Department of Commerce, the Tennessee Valley Authority, the U.S. State Department, the U.S. Agency for International Development, the U.S. Department of Housing and Urban Development, the U.S. Department of Justice, the U.S. Department of Labor, the U.S. Department of the Treasury, the U.S. Department of Defense, the National Archives, the U.S. Department of Veterans Affairs, the U.S. Environmental Protection Agency, the U.S. Department of Interior, the Federal Emergency Management Agency, the National Science Foundation, the Corporation for National and Community Service, and the U.S. Department of Transportation as not having changed their regulations interpreting Title IX. *A.N.A.* (W.D. Ky.) at ¶ 44 (referencing 6 C.F.R. § 17.415; 10 C.F.R. § 5.415; 10 C.F.R. § 1042.415; 13 C.F.R. § 113.415; 14 C.F.R. § 1253.415; 18 C.F.R. § 1317.415; 22 C.F.R. § 146.415; 22 C.F.R. § 229.415; 22 C.F.R. § 3.415; 28 C.F.R. § 54.415; 29 C.F.R. § 36.415; 31 C.F.R. § 28.415; 32 C.F.R. § 196.415; 36 C.F.R. § 1211.415; 38 C.F.R. § 23.415; 40 C.F.R. § 5.415; 43 C.F.R. § 41.415; 44 C.F.R. § 19.415; 45 C.F.R. § 618.415; 45 C.F.R. § 2555.415; and 49 C.F.R. § 25.415).

charter is a single-school LEA, if that school accepts funding from federal departments besides the DOE, then that charter may still violate other federal agencies' Title IX regulations. Moreover, despite the DOE's recent changes to its Title IX regulations, Title IX itself has not changed. Consequently, given its historical interpretation by courts and agencies, material challenges remain for sex-segregated charters to live peacefully with Title IX, regardless of recent, and arguably immaterial, legislative ("consistent with existing law") and regulatory (one agency, the DOE) action.

IV. CONSTITUTIONAL AND JUDICIAL UNDERPINNINGS

When assessing the constitutionality of the government's actions, courts use three levels of review, depending upon the individual or group affected by the government's acts. First, "Legislatures are presumed to have acted constitutionally even if source materials normally resorted to for ascertaining their grounds for action are otherwise silent, and their statutory classifications will be set aside only if no grounds can be conceived to justify them."¹³⁰ Therefore, so long as the government's acts are rationally related to some governmental interest, courts defer to the governmental action. This proposition is commonly known as the "rational basis" test. Greater scrutiny exists, however, for cases involving fundamental rights or suspect classes, and the second level is intermediate scrutiny, which has developed since the early 1970s to apply to cases in which the government's act classifies people based on their sex.¹³¹ Under the intermediate scrutiny standard, for the government's sex-based classification to survive a constitutional challenge, the government must prove a substantial relationship to an important governmental interest, and, in educational contexts, the sex-based classification requires an "exceedingly persuasive justification."¹³² Third is strict scrutiny, which the court applies to cases in which the government makes classifications generally based on race or religion.¹³³ For a government act to

130. *McDonald v. Bd. of Election Comm'rs*, 394 U.S. 802, 809 (1969).

131. *See infra* note 147.

132. *See Miss. Univ. for Women v. Hogan* (Hogan), 458 U.S. 718, 718 (1982); *VMI*, 518 U.S. 515 (1996).

133. *See, e.g., Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

pass strict scrutiny, the government's classification must be necessary to further a compelling government interest.¹³⁴ Less than a handful of federal, let alone Supreme Court, cases address the issue of sex-segregation in public education, with essentially only one Supreme Court case at the K-12 level (and that case without written opinion), and two at the post-secondary level. Because sex-segregated charters receive public funding through a legislated school choice program, and because such charters trigger a sex-based classification, knowledge of the following six cases should prove helpful in understanding how a court may craft a standard against which to judge a sex-segregated charter.

A. *Vorchheimer*

*Vorchheimer v. School District of Philadelphia*¹³⁵ (“*Vorchheimer*”) involved sex-segregated schooling at the K-12 level. *Vorchheimer* wound its way through the courts during the same time that the Supreme Court was developing its intermediate level of review. In the mid-1970s, the public schools in Philadelphia had separate high schools for boys and girls, with the girls’ academy clearly inferior.¹³⁶ A girl was denied admission to attend the all boys school and sued. In 1975, the district court stated that “the outcome of this case depends on which standard of review is applied,”¹³⁷ and noted the development of a new treatment by the Court of sex-based classifications, and “the net effect of which has been to take classifications based on sex out of the province of the ‘rational relationship’ standard and to place them in a new and uncharted territory, possibly uninhabited by any other classification.”¹³⁸ The district court knew the difficult position in which it found itself, remarking that “[a] lower court faced with this line of cases has an uncomfortable feeling, somewhat similar to a man playing a shell game who is not absolutely sure there is a pea.”¹³⁹ The district court ultimately applied a

134. *Id.*

135. *Vorchheimer v. Sch. Dist. of Phila.*, 400 F. Supp. 326, 334 (E.D. Pa. 1975), *rev’d*, 532 F.2d 880 (3rd Cir. 1976), *aff’d by an equally divided court*, 430 U.S. 703 (1977).

136. See discussion *infra* note 145.

137. *Vorchheimer*, 400 F. Supp. at 334.

138. *Id.* at 335.

139. *Id.* at 340-341. The cases examined by the district court included *Reed v.*

test that looked to see “whether a ‘fair and substantial’ relationship” existed between sex-segregation and the “School Board’s legitimate interests,”¹⁴⁰ and determined that impermissible sex discrimination existed. On appeal, however, in March 1976, the third circuit found that the presence “in a system otherwise coeducational of a limited number of single-sex high schools”¹⁴¹ was permissible, so long as enrollment was voluntary and the educational opportunities provided were essentially equal. As in the district court case, the third circuit’s opinion occurred prior to the Court’s December 1976 declaration in *Craig v. Boren*¹⁴² (“*Craig*”) of an intermediate level of scrutiny establishing that classifications by sex “must serve important governmental objectives and must be substantially related to [the] achievement of those objectives.”¹⁴³ Just two months after *Craig*, in February 1977, the Court oddly affirmed the third circuit — by an equally divided vote — with no published opinion.¹⁴⁴ The Philadelphia policy was revisited in state court several years later, having been brought under state law claims, and the state court ruled that the schools violated the state constitution and that *Vorchheimer* was based on “incomplete facts and evidence.”¹⁴⁵

Reed, 404 U.S. 71 (1971) (first establishing that sex-based classifications were subject to scrutiny), *Frontiero v. Richardson*, 411 U.S. 677 (1973), *Kahn v. Shevin*, 416 U.S. 351 (1974), *Schlesinger v. Ballard*, 419 U.S. 498 (1975), *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975), and *Stanton v. Stanton*, 421 U.S. 7 (1975).

140. *Vorchheimer*, 400 F. Supp. at 343.

141. *Vorchheimer*, 532 F. 2d at 881. The third circuit indicated that each of the cases cited by the district court involved “an actual deprivation or loss of a benefit to a female which could not be obtained elsewhere.” *Id.* at 886. The third circuit reasoned that none of those cases concerned a situation in which equal opportunity was extended to each sex or in which the restriction applied to both sexes. Significantly, none of those cases occurred in an educational setting. *Id.* at 886.

142. 129 U.S. 190 (1976).

143. *Id.* at 197 (Rehnquist, C.J. dissenting) (referencing the majority opinion).

144. *Vorchheimer*, 430 U.S. 703.

145. *Newberg v. Bd. of Pub. Educ.*, 9 Phila. 556 (1983), *aff’d on other grounds*, 478 A.2d 1352 (Pa. Super Ct. 1984). The state trial court indicated that

the *Vorchheimer* court was not provided with many relevant available data, or was provided with only tentative and incomplete facts and evidence. Specifically, incomplete or no evidence was presented as to the following facts: Girls High students attend classes at Central High (thus undermining the conclusion that “adolescents may study more effectively in single-sex schools”); Central High graduates (who have passed all major subjects above ninth grade) are awarded Bachelor of Arts degrees, whereas Girls High graduates receive high school diplomas; there are 2.7 times more Ph.D.’s and 1.5 times more teachers with 21 years (or more) of teaching experience at Central High; Central High’s campus is almost three times larger; Central High’s library not only contains 50,000 volumes (a fact brought out in *Vorchheimer*) but Girls High’s library contains almost fifty

B. Hogan

The Court reviewed a public university's sex-segregated admissions policy in 1981 when a man was denied admission to a state nursing school because of his sex, in *Mississippi University for Women v. Hogan*¹⁴⁶ ("Hogan"). Justice O'Connor wrote the Court's majority opinion and stated that "the party seeking to uphold a statute that classifies individuals on the basis of their gender must carry the burden of showing an 'exceedingly persuasive justification' for the classification," and that "burden is met only by showing at least that the classification serves 'important governmental objectives and that the discriminatory means employed' are 'substantially related to the achievement of those objectives.'"¹⁴⁷ Using that test, the Court struck down the public university's sex-segregated admissions program. The Court also stated that "although the State recited a 'benign, compensatory purpose,' it failed to establish that the alleged objective is the actual purpose underlying the discriminatory classification."¹⁴⁸ In *Hogan*, the state failed to establish the "exceedingly persuasive justification" needed to sustain the sex-based classification, and the school's admissions policy violated the Equal Protection Clause.¹⁴⁹

percent fewer volumes at 26,300; the library room and setting at Central High are appreciably more aesthetic; Central High has more instructional equipment, including a separate computer room; both Central High and Girls High offer courses, as well as some club activities, that are not available at the other; additional prerequisites for AP Chemistry and AP Physics are imposed upon Girls High students but not Central High students; Girls High students almost invariably score lower than Central High students in testing on the Preliminary Scholastic Aptitude Test/National Merit Scholarship Qualifying Test, as well as on the Scholastic Aptitude Test ("SAT"); whereas 91.8% of Central High students are accepted into college, four percent less or 87.8% of Girls High students are so accepted; Central High students were beneficiaries (at least in 1979) of 1.2 million dollars in college scholarships, whereas Girls High students were beneficiaries of less than half that sum at one-half million dollars; the option of "contract gym", while available to Central High students, is not granted to Girls High students; while students attending Central High have been beneficiaries of some \$382,145 over a twelve-year period from the Barnwell Foundation, students at Girls High are excluded therefrom, the latter group engaging in annual magazine subscription sales to gain funding.

Newberg, 9 Phila. at 564-566 (citations omitted).

146. *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982).

147. *Hogan*, 458 U.S. at 724 (citations omitted) (referencing *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981), *Personnel Adm'r v. Feeney*, 442 U.S. 256, 273 (1979), and *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980)).

148. *Hogan*, 458 U.S. at 730.

149. *Id.* at 731.

C. Garrett

Ten years following *Hogan*, Detroit attempted to establish a number of all-male Afrocentric K-12 schools “in response to the crisis facing African-American males manifested by high homicide, unemployment, and drop-out rates.”¹⁵⁰ Applying the second prong of the Court’s *Hogan* test, the *Garrett* court found “no evidence that the educational system is failing urban males because females attend schools with males. In fact, the educational system is also failing females.”¹⁵¹ While the *Garrett* court stated that attempting to help urban male students constituted an important governmental objective, no evidence existed that “the presence of girls in the classroom bears a substantial relationship to the difficulties facing urban males.”¹⁵² Because *Garrett* was a district court opinion, it may be instructive, but the decision is binding only in the eastern district of Michigan.

D. VMI

The most recent guidance from the Supreme Court relative to sex-segregated admissions policies by government schools occurred in 1996’s *VMI*¹⁵³ decision. In a majority opinion written by Justice Ginsburg,¹⁵⁴ the *VMI* court stated that it will take a “strong presumption that gender classifications are invalid”¹⁵⁵ and quoted *Hogan*, reiterating that “[p]arties who seek to defend gender based government action must demonstrate an ‘exceedingly persuasive justification’”¹⁵⁶ for that action. Further, the government’s justification must “be genuine, not hypothesized or invented *post hoc* in response to litigation,”¹⁵⁷ and “must not rely on overbroad generalizations

150. *Garrett*, 775 F. Supp. at 1007.

151. *Id.* at 1008.

152. *Id.* at 1007.

153. *VMI*, 518 U.S. 515 (1996).

154. Prior to becoming a member of the Court, Justice Ginsburg founded the ACLU’s Women’s Rights Project. AMERICAN CIVIL LIBERTIES UNION: TRIBUTE: THE LEGACY OF RUTH BADER GINSBURG & THE WRP STAFF (2006), <http://www.aclu.org/womensrights/gen/24412pub20060307.html> (last visited Aug. 3, 2009). The ACLU’s Women’s Rights Project filed the complaint challenging a sex-segregated Kentucky public school in *A.N.A. supra* notes 127, 129.

155. *VMI*, 518 U.S. at 532 (quoting concurrence of Kennedy, J., in *J.E.B. v. Alabama ex. rel T.B.*, 511 U.S. 127, 152 (1994)).

156. *Id.* at 524 (quoting *Hogan*, 458 U.S. at 724).

157. *Id.* at 533 (citations omitted).

about the different talents, capacities, or preferences of males and females.”¹⁵⁸ Even if the government’s objectives are genuine, however, the Court did “not question the Commonwealth’s prerogative evenhandedly to support diverse educational opportunities. We address specifically and only an educational opportunity recognized by the District Court and the Court of Appeals as ‘unique.’”¹⁵⁹ A constitutionally consistent solution, however, can include offering the excluded sex a comparable alternative.¹⁶⁰ While Justice Scalia dissented that “[t]he rationale of today’s decision is sweeping . . . [and] ensures that single-sex education is *functionally dead*,” his prediction appears to have been incorrect, as evidenced by the exponential growth in sex-segregated public schools across the U.S. in the past decade.¹⁶¹

E. Zelman — School Choice

Recognizing that two distinct constitutional analyses are involved when comparing claims of governmental classes based on sex and race or religion,¹⁶² the Court’s majority in *Zelman v. Simmons-Harris*¹⁶³ (“*Zelman*”) nonetheless merits discussion for two reasons. First, it is a relatively recent decision by the Court involving K-12 education. Second, it involved the flow of

158. *Id.*

159. *Id.* at 534 n.7 (citations omitted).

160. *Id.* at 529 (citing *U.S. v. Va.*, 44 F.3d 1229, 1241 (4th Cir. 1995)) (Phillips, J. dissenting). The comparability standard and other potential solutions offered by the VMI court are discussed in Part V.A-B, *infra*. See also the VMI majority’s discussion of “substantial equality” as a part of the comparability test, *infra* notes 219, 232.

161. According to NASSPE, the number of public schools offering single-sex classrooms in the U.S. rose from 11 in 2002 to over 400 in 2008. Nat’l Assoc. for Single Sex Pub. Educ., Schools with Single-Sex Classrooms, <http://www.singlesexschools.org/schools-schools.htm> (last visited Mar. 26, 2010).

162. Precedent exists for segregated schools to pass strict scrutiny. See *Hunter v. Regents* (“*Hunter*”), 190 F.3d 106 (1999), *cert. denied* 69 U.S.L.W. 3110 (U.S. Oct. 2, 2000). In *Hunter*, when a student was denied admission to a public elementary school because of her race, her parents sued. However, the school was conducted as a research lab by UCLA’s Graduate School of Education, and because of the elementary school’s mission was to research and develop effective techniques for use in urban public schools, the use of race in the school’s admissions process survived strict scrutiny. The court indicated that the state had a compelling interest in providing effective education to a diverse population, the use of race in admissions was narrowly tailored to produce research results that could be used to improve education in the state, and the school did not admit students solely on the basis of a single race; the researchers achieved a desired diverse population. *But see* *Parents Involved v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007), discussed in Part IV.F, *infra*.

163. *Zelman v. Simons-Harris*, 536 U.S. 639 (2002) (5-4 decision).

taxpayer funds that were directed to schools — including sex-segregated private schools¹⁶⁴ — based on the number of students exercising an option to attend that school under a school choice program. Ohio was sued over its voucher program, which allowed financially qualified students (relative to the poverty line)¹⁶⁵ to obtain a check or voucher from taxpayer funds from the state. The voucher recipient could then endorse the voucher to any approved school, public or private,¹⁶⁶ and attend the private school.¹⁶⁷ In a decision in which six separate opinions were published, Chief Justice Rehnquist wrote the majority opinion holding that Ohio's voucher program did not violate the establishment clause.¹⁶⁸

A recent argument asserted that charters may survive strict scrutiny and discriminate based on religion, due to the Court's "private-choice" doctrine.¹⁶⁹ This argument asserted, first, because charters are a creation of school choice, and individual choices are a condition precedent to any funds flowing to the schools, charters do not sufficiently entangle the school and government.¹⁷⁰ The argument next stated that the requirement of an intermediate step (i.e., the presentation of a check by a parent, rather than by the government, to a sex-segregated or religious school) in the flow of funding may be viewed as immaterial, and direct funding (charters) and indirect funding (voucher schools) is a distinction without a

164. See, e.g., EDCHOICE PARTICIPATING PRIVATE SCHOOLS, OH. DEP'T OF EDUC. 6 (2009) (including St. Xavier, an all-boys Jesuit high school in Cincinnati, Ohio, Seton High School, an all-girls Catholic school, also in Cincinnati). St. Xavier Admissions, <http://www.stxavier.org/page.cfm?p=4> (last visited Mar. 26, 2010) ("Young men from more than 100 grade schools throughout Greater Cincinnati come to St. X's 110-acre campus and leave to populate the world as men with a genuine sense of home and belonging."); Seton High School, History of Seton, <http://www.setoncincinnati.org/about/history/> ("Seton has maintained a strong commitment to academic excellence by offering a comprehensive curriculum to the young women of Western Cincinnati").

165. OHIO REV. CODE ANN. § 3313.978(A) (Anderson 2006).

166. *Id.* § 3313.976.

167. Assuming the student met the certain other admissions requirements of the school.

168. *Zelman*, 536 U.S. 639 (2002) (5-4 decision).

169. Note, *Church, Choice, and Charters: A New Wrinkle for Public Education?*, 122 HARV. L. REV. 1750 (2009).

170. *Id.* at 1759-62, 1768-69. The *Zelman* majority stated that "no reasonable observer" would interpret the indirect flow of funds from the government to religious institutions via a series of individual choices as 'carrying with it the *imprimatur* of government endorsement.'" *Id.* at 1761, 1768-79 (quoting *Zelman*, 536 U.S. at 655) (citing *Mitchell v. Helms*, 530 U.S. 793, 817-18 (2000) (plurality opinion)).

difference.¹⁷¹ Thus, this argument concluded that because the funding mechanism of charters is sufficiently similar to voucher schools, charters may be equally insulated from being viewed as having the government's *imprimatur*.

But that argument is incomplete and misleading. The *Zelman* majority explicitly articulated its school choice funding rationale when it said that "[t]he incidental advancement of a religious mission, or the perceived [government] endorsement of a religious message, is [constitutionally permissible when it is] reasonably attributable to the individual [funding] recipient, not to the government, whose role ends with the disbursement of benefits."¹⁷² The government's role does not end with the disbursement of benefits to charters. Instead, when the government disburses funds to charters, its role is "just getting warmed up," as actor Al Pacino memorably barked in a movie concerning a sex-segregated high school.¹⁷³ With charters, the government authorizes, re-authorizes, oversees, and is empowered to shutter every aspect of the very schools to which it distributes the funds. The entirety of the charter's operation—every computer or desk purchased, every teacher's, counselor's, principal's, nurse's, aide's, and janitor's employment and compensation can be funded entirely by the government.¹⁷⁴ Nearly every action of these employees—whether in a class, hallway, club, sport, dance, or other activity—has the direct *imprimatur* of the state, as does every curricular choice or pedagogical method that the charter uses. Countless of these acts, whether tortuous or otherwise, could

171. The argument asserted that "a plurality in *Mitchell v. Helms* expressly disclaimed the significance of an intermediate step in the flow of funding from government to religious schools, finding that respondents' reliance on a 'direct/indirect distinction to require that any aid be literally placed in the hands of schoolchildren rather than given directly to the school for teaching those same children' was an exercise in empty formalism, which 'breaks down in the application to real-world programs.'" *Church, Choice, and Charters*, *supra* note 169 at 1768-69.

172. *Zelman*, 536 U.S. at 652 (emphasis added).

173. Pacino won an Academy Award as best male actor in a leading role for his performance in *SCENT OF A WOMAN* (Universal Pictures 1992), <http://www.imdb.com/name/nm0000199/awards> (last visited Aug. 3, 2009).

174. A number of charters receive some degree of private support from charitable foundations and individuals, but that support is a supplement to the state funding needed for operation and does not constitute anywhere near a majority of a charter's funding. See, e.g., MATCH Charter Public High School, Donate, <http://www.matchschool.org/getinvolved/donate.htm> (last visited Aug. 3, 2009). Therefore, public funds may, but do not have to, fund a charter's operations in their entirety.

result in legal action against the state. The same simply cannot be said about private schools that accept voucher funds.

Only a small portion of the operations of a private school that accepts vouchers will be financed by funds coming from the state. In *Zelman*, the choice to use the publicly funded vouchers was granted to a limited number of students who were (a) in failing districts and (b) demonstrating financial need relative to the poverty line. And unless some perverse version of Lake Wobegone exists where *all* of an area's children are in failing schools and showing a below average financial position, unlike voucher choice, all students¹⁷⁵ in a given area are eligible to attempt to enroll in a charter. Private schools that receive public funds via vouchers have only a single connection to the state — receipt of a modest amount of public funds; charters are intertwined with the government continuously. Although the private choice cases indeed involved school choice and public funds within K-12 education, charters cannot be considered anything but public schools; as a result, the private choice cases are irrelevant to further discussion and analysis.

F. Parents Involved — Segregation

Lastly, the 2007 racial segregation case of *Parents Involved v. Seattle School District No. 1*¹⁷⁶ is also instructive, because the *VMI* court indicated that the Court's prior opinions in racial segregation cases could be used as a basis for analyzing sex-segregation cases. The *VMI* majority ruled that Virginia failed to provide females with a "substantially equal" education that was "in line with [the Court's holding in] *Sweatt* [*v. Painter*]." ¹⁷⁷ In *Sweatt*, Texas created two racially segregated law schools because the state did not want to admit students of color to its all-white University of Texas Law School. The *VMI* court applied the Court's racial segregation analysis in the context of the sex-segregation case before it. The *VMI* majority stated that "the [*Sweatt*] Court emphasized [that more important than tangible features], are 'those qualities which are incapable of objective measurement but which make for

175. Excluding those students who are rejected because of a sex-segregated admissions policy.

176. 551 U.S. 701 (2007).

177. *VMI*, 518 U.S. at 554 (citing *Sweatt v. Painter*, 339 U.S. 629, 633 (1950)).

greatness' in a school, including 'reputation of the faculty, experience of the administration, position and influence of the alumni, standing in the community, traditions and prestige.'¹⁷⁸ Whether based on race or sex, the *VMI* majority would therefore apply these same factors of equality to both types of segregation. Because (1) the *VMI* majority had indicated that its rationales in racial segregation cases such as *Sweatt* were applicable to sex-segregation cases such as *VMI*, (2) *Parents Involved* dealt with segregation in K-12 public education, and (3) Chief Justice Roberts wrote the majority opinion (giving insight as to how both he and Justice Alito as two of the newer members of the Court approach segregation issues), *Parents Involved* may help to provide an analytic for approaching sex-segregated charters.¹⁷⁹ Just as using sex-segregated admissions policies involve the binary of male and female, in *Parents Involved*, Seattle's public schools used only the binary white/non-white racial classifications as a tie-breaker to assign students to various high schools.¹⁸⁰ The *Parents Involved* majority rejected Seattle's binary racial segregation plan as unconstitutional, quoting from *Brown*: "The impact [of segregation] is greater when it has the sanction of law."¹⁸¹ In striking down Seattle's public school binary segregation plan, the *Parents Involved* majority stated that

race is not considered as part of a broader effort to achieve "exposure to widely diverse people, cultures, ideas, and viewpoints[;]" race, for some students, is determinative standing alone. The districts argue that other factors, such as student preferences, affect assignment decisions under their plans, but under each plan *when race comes into play, it is decisive by itself. It is not simply one factor weighed with others in reaching a decision . . . the plans here "do not provide for a meaningful individualized review of applicants"* but

178. *Id.* at 554 (citing *Sweatt*, 339 U.S. at 634).

179. Having said that, because as in *Zelman*, the Justices published six opinions in *Parents Involved*, its instructive value is complex and arguably tenuous.

180. *Parents Involved* at 724 (stating that "under the Seattle plan, a school with 50 percent Asian-American students and 50 percent white students but no African-American, Native-American, or Latino students would qualify as balanced, while a school with 30 percent Asian-American, 25 percent African-American, 25 percent Latino, and 20 percent white students would not.").

181. *Id.* at 746 (quoting *Brown v. Bd. of Educ.* at 494) (citations omitted) (brackets in original).

instead rely on racial classifications in a “nonindividualized, mechanical” way.¹⁸²

At the end of the majority opinion, Chief Justice Roberts wrote succinctly: “[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”¹⁸³ Assuming that the Court continues to extrapolate its rationale from public school racial segregation cases to public school sex-segregation cases as it did in *VMI*, and given that some charters segregate students based on a binary, as in *Parents Involved*, because sex-segregated charters’ admissions policies rely on classifications in a “nonindividualized, mechanical” way,¹⁸⁴ these charters’ policies beg for equal protection clause challenges.

V. THE COURT’S EQUAL PROTECTION CLAUSE TESTS APPLIED TO A NEW YORK SEX-SEGREGATED CHARTER

Because a charter is a public school, it is a state actor subject to equal protection clause challenges. In matters involving public education, the Court historically has deferred to the states.¹⁸⁵ This judicial deference that benefits charters in general, however, shifts to a “skeptical scrutiny”¹⁸⁶ when public schools apply sex-based classifications. Therefore, a state actor must produce an exceedingly persuasive justification to

182. *Id.* at 723 (citations omitted) (emphasis added).

183. *Id.* at 748.

184. *Id.* at 723.

185. The Supreme Court has stated: (1) “education is perhaps the most important function of state and local governments,” (*Brown v. Bd. of Educ. of Topeka*, 347 U.S. 483, 493 (1954)); (2) “[p]roviding public schools ranks at the very apex of the function of a State,” *Wisconsin v. Yoder*, 406 U.S. 205, 213 (1972); (3) courts “lack . . . experience” that “counsels against premature interference with the informed judgments made at the state and local levels,” *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42 (1973); (4) “[n]o single tradition in public education is more deeply rooted than local control over the operation of schools . . .” *Millikin v. Bradley* 418 U.S. 717, 741 (1974); (5) “[t]he very complexity of the problems of . . . managing a statewide public school system suggests that ‘there will be more than one constitutionally permissible method of solving them,’ and that, within the limits of rationality, ‘the legislature’s efforts to tackle the problems’ should be entitled to respect,” *San Antonio Indep. Sch. Dist.*, 411 U.S. at 42 (1973) (quoting *Jefferson v. Hackney*, 406 U.S. 535, 546-547 (1972)); and (6) public schools are “a most vital civic institution for the preservation of a democratic system of government,” *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (quoting *Sch. Dist. of Abington Township v. Schempp*, 374 U.S. 203, 230 (1963) (Brennan, J., concurring)). Such deference by the Court is a strong positive signal for continued charter expansion and general innovation.

186. *VMI*, 518 U.S. at 531.

maintain the sex-segregated education. Reviewing the constitutionality of all sex-segregated charters is beyond the scope of this Article's analysis. New York, nonetheless, serves as a compelling study of sex-segregated charters because the state (a) legislatively authorized the creation of sex-segregated charters, (b) currently has sex-segregated charters in operation, and (c) has articulated transparently its important government objectives in authorizing these charters and how it believes its sex-segregated policies are substantially related to those objectives. As a result, New York presents strong policy and legislative arguments alongside transparent decision-making in favor of sex-segregated charters that can be analyzed under the equal protection clause.

A. Background on University Prep and the General Equal Protection Test

In June 2009, New York approved a sex-segregated charter to operate in the city of Rochester. The state approved the University Preparatory Charter School for Young Men ("University Prep"), and the school is scheduled to open in September 2010.¹⁸⁷ Structurally, University Prep anticipates

providing an extended school day and year[,] . . . daily time for individualized learning support called QuadE (enrichment, enhancement, expansion or exploration)[,] . . . daily time for guided study to allow students to obtain homework support, study groups, and academic support services[,] . . . a mentor from the community for each student[,] . . . and daily advisory or crew time to allow for consistent support and guidance among a small group of 10-12 students.¹⁸⁸

Similar to Boston's nationally ranked MATCH Charter Public High School,¹⁸⁹ University Prep "plans to hold a summer institute each year to orient new students."¹⁹⁰ Moreover, the

187. CHARTER SCHOOLS INSTITUTE, THE STATE UNIVERSITY OF NEW YORK, SUMMARY OF FINDINGS & RECOMMENDATIONS, APPLICATION TO ESTABLISH THE UNIVERSITY PREPARATORY CHARTER SCHOOL FOR YOUNG MEN 5 (Jun. 12, 2009)[hereinafter *UPREP SUMMARY*].

188. *UPREP SUMMARY* at 2.

189. See *The Top of the Class: The Complete List of the 1,500 Top U.S. High Schools*, Newsweek Web Exclusive, June 8, 2009, <http://www.newsweek.com/id/201160> (last visited Aug. 3, 2009) (ranking MATCH 85th in the U.S. for 2009); see also discussion of MATCH, *supra* note 55.

190. *UPREP SUMMARY*, at 2.

school intends to establish partners with local colleges, including "SUNY Geneseo, Nazareth College, St. John Fisher College, Monroe Community College and Bryant and Stratton College."¹⁹¹ In terms of stakeholder buy-in, University Prep's mission is "for its students to master higher order thinking skills, productive life skills and to develop the quest for learning needed to graduate from high school, succeed in higher education, and to be successful in the work place."¹⁹² "To achieve its mission," University Prep anticipates "implement[ing] a specific curriculum known as Experiential Learning Outward Bound" ¹⁹³ ("ELOB"). ELOB uses an "active pedagogy" that "engage[s] students using ELOB structures that encourage rigor, collaboration, leadership skills, and character building [and] utilizes learning expeditions that cross disciplines to engage students in real world applications of required curriculum content."¹⁹⁴

Because the charter admits only males a presumption exists against University Prep's constitutionality.¹⁹⁵ This presumption can be rebutted, however, if the government shows an "exceedingly persuasive, genuine" justification for the segregation that does not rely on overbroad generalizations about the different capacities of the sexes, "serves 'important governmental objectives and . . . the discriminatory means employed' are 'substantially related to the achievement of those objectives,'" ¹⁹⁶ or if the government offers a comparable alternative to the excluded sex.¹⁹⁷ Enrollment must be voluntary, and comparable options such as courses, services, and facilities must be available to students of both sexes.

In approving University Prep's charter application, New York stated that "the school's goal of promoting equal educational opportunity for males that are not receiving the benefits of public education in Rochester in proportion to females . . . serves an important governmental objective."¹⁹⁸

191. *Id.*

192. *Id.* at 1.

193. *Id.*

194. *Id.*

195. *See VMI*, 518 U.S. at 531.

196. *See Id.* at 533 (quoting *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142, 150 (1980)) (internal quotation marks omitted).

197. *Id.* at 531.

198. UPREP SUMMARY, at 5.

New York's important government objectives included promoting "public school diversity and choice" and serving the area's needs of male students with documented difficulties in the traditional public schools.¹⁹⁹ New York indicated that the sex-segregated admissions policy was substantially related to those objectives, and "not based on invidious discrimination against females."²⁰⁰

Since the Court's last guidance on sex-segregation in *VMI*, NCLB's mandate for the DOE to revisit legally consistent sex-segregated education,²⁰¹ the 2006 DOE Regulations, and New York's authorization of sex-segregated charters constitute arguably meaningful federal and state justifications in favor of sex-segregated charters. But meaningful does not equal "exceedingly persuasive," and beyond providing these broad justifications, the University Prep charter approval also articulated specific policy reasons for allowing University Prep to be sex-segregated. The application's approval was based on "numerous studies and experts that support single sex education, including Lee, Byrk, Marks, Mael, and Riordan. *These researchers confirm that single-sex schools improve student achievement.*"²⁰² However, many of the authors on which New York relied to confirm its conclusion failed to control for meaningful variables in their studies, are outdated, have indicated that any benefits associated with sex-segregated schooling are inconclusive, and have been improperly used by proponents of sex-segregated education.

For example, Nancy Levit conducted an exhaustive policy analysis that concluded, "the studies [including Lee, Byrk, Marks, and Riordan] show no consistent advantages in educational quality in single-sex schools, once confounding variables are controlled."²⁰³ Levit further stated that "Lee and Byrk did not control for 'possible preexisting differences in academic achievement, prior course work, self-concept, locus of control or other school-related behaviors and attitudes that were considered as outcomes.'"²⁰⁴ Moreover, Lee and Marks

199. *Id.*

200. *Id.*

201. See Part III, *supra*.

202. UPREP SUMMARY, at 1 (emphasis added).

203. Levit, *supra* note 1 at 521.

204. *Id.* at 487 (citing Herbert W. Marsh, *Effects of Attending Single-Sex and Coeducational High Schools on Achievement, Attitudes, Behaviors, and Sex Differences*,

demonstrated that boys who attended sex-segregated high schools experienced “no statistically significant effects, either positive or negative, on college attitudes and values,”²⁰⁵ and graduates of all boys schools were “less likely to show concerns for social justice” and were “less satisfied with the nonacademic aspects of their colleges”²⁰⁶ While Fred Mael indicated in 1998 that sex-segregated schooling may provide “academic and attitudinal benefits for at least some students,”²⁰⁷ his more contemporary 2005 research prepared for the DOE concluded: “For many outcomes, there is no evidence of either benefit or harm.”²⁰⁸

Peeling back the layers, the three overarching reasons behind charter success appear to cause student improvement in sex-segregated schools, not the sex-segregation *per se*. For example, Lee not only “credited the *organizational and administrative* characteristics common in single-sex Catholic schools for their ‘success’”²⁰⁹ but also believed that “separating adolescents by gender for secondary schooling is not an appropriate solution . . . in educational outcomes, either in the short or the long run.”²¹⁰ Providence College Sociology Professor Cornelius Riordan’s 1999 research stated:

single gender schools work . . . for girls and boys, women and men, whites and nonwhites, but this effect is limited to disadvantaged students. Research has demonstrated that the effects of single-gender schools are greatest among students who have been disadvantaged historically — disadvantaged minorities, low and working class youth Furthermore, *these significant effects for at-risk students are small in*

81 J. EDUC. PSYCHOL. 70, 72 (1989)).

205. Valerie E. Lee & Helen M. Marks, *Sustained Effects of the Single-Sex Secondary School Experience on Attitudes, Behaviors, and Values in College*, 82 J. EDUC. PSYCHOL. 578, 585 (1990).

206. *Id.* at 586.

207. Fred A. Mael, *Single-Sex and Coeducational Schooling: Relationships to Socioemotional and Academic Development*, 68 REV. EDUC. RES. 101, 101 (1998).

208. FRED MAEL ET AL. SINGLE-SEX VERSUS COEDUCATIONAL SCHOOLING: A SYSTEMATIC REVIEW, AT X (POL’Y & PROG. STUD. SVC. 2005). This study included “an exhaustive search” that began with a review of 2,221 studies. *Id.*

209. Levitt, *supra* note 1 at 505 n. 395. In addition, Lee stated that she “found positive effects from single-sex education ‘only in Catholic schools.’ The findings there were consistent: positive effects for girls but no difference for boys.” *Id.* at 487 (citing Valerie E. Lee, *Is Single-Sex Secondary Schooling a Solution to the Problem of Gender Inequity*, in AMERICAN ASS’N. WOMEN EDUC. FOUND., SEPARATED BY SEX: A CRITICAL LOOK AT SINGLE-SEX EDUC. FOR GIRLS, 41, 43 (1998)).

210. Lee, *supra* note 209, at 46.

*comparison with the much larger effects of home background and type of curriculum in a given school.*²¹¹

....

The pro-academic choice made by parents and students is the key explanatory variable [I]f you could produce this result without [sex] exclusion, that would be preferable but it is not possible in American society or schools at this time."

That time was ten years ago, only a few years into the charter movement and too early to study how charters, rather than sex-segregated schooling, affected Riordan's key variable of choice. Assuming *arguendo* that Riordan's research was correct that choice is the key variable to greater academic success in sex-segregated environments for historically disadvantaged urban youth, then the argument for sex-segregated charters is even weaker today. Again, in 1999, Riordan noted:

*This academic environment is a function of the choicemaking process that is made by students who attend single-gender schools. In this regard, it is entirely different from a set of structures or programs that are put into place by educators. In single-sex schools, the academic environment is normative in a true sociological sense. It is a set of rules established by the subjective reality . . . of participants, which takes on an objective reality as a set of structural norms [A]lternatives . . . for creating a pro-academic environment . . . in schools generally should be considered. Specifically, examine the organizational features of effective schools.*²¹²

By taking a system that permits for choicemaking and coupling it with an examination (and presumably replication) of successful organizational characteristics, and adding a normative environment (i.e., stakeholder buy-in), charters ipso facto negate any exceedingly persuasive justification for sex-segregated education.

More contemporary studies also support this conclusion. In

211. Comment, Cornelius Riordan, in *Single-Sex Schooling: Law, Policy, and Research*, 2 BROOKINGS INST. PAPERS ON EDUC. POL. 231, 283-84 (1999) (emphasis added). Riordan's research included solely sex-segregated schools, not sex-segregated classrooms, as he believed that "an academic culture that is endemic to single-sex schools . . . cannot be produced in one or two classrooms within an otherwise coeducational school." *Id.* at 283, 285.

212. *Id.* at 285-86 (emphasis added).

2005, Lee Hubbard and Amanda Datnow examined California's sex-segregated public school pilot program and stated that "these schools' successes were due more to the interrelated contributions of the schools' organizational characteristics, positive student-teacher relationships, and ample resources."²¹³ Again, *organizational architecture, choice, and buy-in* — the very components creating charter success — are what support improved urban public education, not sex-segregation.²¹⁴ Moreover, a study published in late 2008 led by Professor Riordan similarly confirmed that the results of sex-segregated schooling were mixed.²¹⁵ Another study published in 2009 stated that sex-segregated education led to "limited benefits," and the results of the study did "not provide a ringing endorsement of single-sex education."²¹⁶ Nonetheless, the sole area in which that study found that sex-segregated schooling "may . . . provide an important opportunity to continued improvements in educational quality" was for black males and low income students, who "experience unique gains" in sex-segregated classes.²¹⁷ While the evidence on sex-segregated schooling is inconclusive, even assuming *arguendo* that

213. Lea Hubbard & Amanda Datnow, *Do Single-Sex Schools Improve the Education of Low-Income and Minority Students? An Investigation of California's Public Single-Gender Academies*, 36 ANTHROP. & EDUC. Q. 115, 115 (2005).

214. See also Deborah L. Rhode, *Single-Sex Schools Can Only Be Way Stations*, 1997 NAT'L L.J. A19 (stating that "[c]oeducational classrooms that use teaching strategies common in all-female environments have proven equally successful in improving girls' math and science."). Moreover, Beth Williger asserted that

studies indicate that certain components, other than the separation by sex, create equitable and effective educational environments: (1) a relatively small student body that allows students to develop a sense of personalism and connectedness to the group; (2) a strong emphasis on academic content and achievement; (3) high expectations for student achievement; and (4) a shared understanding of and commitment to the school's mission and values.

Beth Willinger, *Single Gender Education and the Constitution*, 40 LOY. L. REV. 253, 256 (1994).

215. RMC RES. CORP. (led by Cornelius Riordan), *EARLY IMPLEMENTATION OF PUBLIC SINGLE-SEX SCHOOLS: PERCEPTIONS AND CHARACTERISTICS* ix, x 2008 (prepared for DOE Office of Planning, Evaluation, & Policy Development) (stating:

The results of the systematic review are mixed Among the concurrent academic accomplishment outcomes, 53 percent were null (favored neither single-sex nor coed schooling), 10 percent had mixed results across sex or grade levels, 35 percent favored single-sex schooling, and only 2 percent favored coed schooling. Among the concurrent socio-emotional outcomes, 39 percent were null, 6 percent were mixed, 45 percent favored single-sex schooling, and only 10 percent favored coed schooling).

216. Sherrilyn M. Billger, *On Reconstructing School Segregation: The Efficacy and Equity of Single-Sex Schooling*, 28 ECON. OF EDUC. REV. 393, 402 (2009).

217. *Id.* (emphasis added).

research continued to confirm that “[s]ingle-sex education affords . . . *benefits to at least some students*”²¹⁸—in this case black males and low income students—such a justification was acknowledged by the *VMI* court and still did not survive constitutional scrutiny. As a result, even if New York had important governmental objectives in offering sex-segregated charters, the evidence proffered by the state in the University Prep charter application did not bear a substantial relationship to those important objectives. Because this relationship was based on dated and unsupported data that only provides hypothesized benefits to some students, the justification for University Prep’s sex-segregation cannot rise to the exceedingly persuasive level required by *VMI*.

B. Possible Safe Harbors

The *VMI* majority indicated that unique sex-segregated education may be constitutionally permissible if comparable educational opportunities are provided for the excluded sex.²¹⁹ To claim that a traditional public school is comparable to a charter is to negate the history, rationale, and basis for charters’ existence. Telling a student that the traditional public school provides a comparable education ignores all three prongs of what makes charters unique: choice through markets, unique organizational structure, and stakeholder buy-in. If traditional public schools were indeed comparable, charters would not exist. Nonetheless, New York specifically found that comparable facilities and programs existed for females in Rochester’s traditional public schools.²²⁰ The state indicated that “comparable facilities and programs” existed for females in the traditional Rochester public schools, because “the academic program and curriculum” provided to University Prep was “founded on the identical . . . New York State Learning Standards taught in the Rochester district schools,” and the ELOB curriculum to be implemented at University

218. *VMI*, 518 U.S. at 535 (emphasis added).

219. “Virginia, in sum, while maintaining VMI for men only, has failed to provide any ‘comparable single-gender women’s institution.’” *Id.* at 553 (citation omitted). In framing comparability, the *VMI* majority looked to Judge Phillips’ dissent in the third circuit, which included “substantially comparable curricular and extra-curricular programs, funding, physical plant, administration and support services . . . faculty[,] and library resources.” *Id.* at 548 (referencing *VMI*, 44 F.3d 1229, 1250 (4th Cir. 1995)).

220. UPREP SUMMARY, at 5.

Prep was “not a significant departure” from the curriculum at the traditional public schools.²²¹ New York made this assertion despite having stated elsewhere in the University Prep Summary that the ELOB curriculum was already used by a charter in the city of Buffalo, New York, and

its 9th and 10th grade students outperformed all but one of Buffalo’s non-selective high schools on the state assessments in English language arts and mathematics in its first year, including high school grades; 90% of its students passed the Living Environment Regents exam, and 88% passed the Math A exam.²²²

According to a recent third-party study, the ELOB curriculum showed “highly promising evidence of success”²²³ when compared to other curricula used for at-risk students. The Rochester City Schools use the ELOB curriculum but only in a school that requires students to complete an application and screening process,²²⁴ and charters do not require admissions applications.²²⁵ Moreover, University Prep indicated that it intended to establish partnerships with a number of specific local colleges that would benefit University Prep students.²²⁶ According to the Rochester City School District’s website, no such collegiate partnerships exist for its schools during the academic year, although one school has an affiliation with the College Board, and the school offers “electives in law and citizenship.”²²⁷ How does excluding females from these opportunities provide them with a comparable opportunity in Rochester? Given these material benefits of University Prep relative to the traditional public schools, it is hard to believe that University Prep does not constitute “a significant departure from what is offered in the Rochester City Schools” and that “comparable facilities and

221. *Id.*

222. *Id.* at 1.

223. GEOFFREY D. BORMAN ET AL. COMPREHENSIVE SCH. REFORM AND STUDENT ACHIEVEMENT: A META-ANALYSIS. REPORT NO. 59 AT 32 (JOHNS HOPKINS UNIV. CTR. FOR RES. ON THE EDUC. OF STUDENTS PLACED AT RISK (“CRESPAR”) Nov. 2002).

224. See Rochester City Schools High School Descriptor, School #58, World of Inquiry School, <http://www.rcsdk12.org/school58/highschooldescriptor.html> (last visited Aug. 3, 2009).

225. See discussion of charter requirements, Part II.B, *supra*.

226. UPREP SUMMARY, at 2.

227. See Rochester City Schools,

<http://www.rcsdk12.org/schools/secondary/NWPREP.htm> (last visited Aug. 3, 2009).

programs for females . . . exist in the Rochester City School District.”²²⁸

Nonetheless, because a number of other charters exist in Rochester, including the Urban Choice Charter²²⁹ and the Rochester Academy Charter School,²³⁰ females arguably may have comparable educational opportunities. More troubling, however, is that part of the stakeholder buy-in with charters is not solely about having theoretical choices; a choice among other schools that do not fit that stakeholder’s wants is hardly a choice. A school’s organizational structure, including its specific curriculum and pedagogy, influence a stakeholder’s choice and buy-in. For example, if an area had three charters, an Afrocentric male school, a coeducational school focused on math and science, and an all-girls school focusing on the arts, the curricula are so divergent that their comparability would be highly questionable. Chief Justice Rehnquist’s concurrence in *VMI* stated that “one [school] could be strong in computer science, the other could be strong in liberal arts. It would be a sufficient remedy, I think, if the two institutions offered the same quality of education and were of the same overall caliber.”²³¹ Even so, as New York illustrated in the University Prep application approval, and as a third-party study demonstrated, the ELOB curriculum is not of the same overall caliber as that used in Rochester’s other public schools, and no reason exists to think that the ELOB curriculum as implemented in Rochester would be anything but similarly superior to Rochester’s other public schools. As a result, Rochester’s other public schools do not appear to meet even the lower standard of comparability set forth by Chief Justice Rehnquist, let alone the existing standard of comparability articulated by Justice Ginsburg in the *VMI* majority.²³²

Beyond a safe harbor for comparability, the *VMI* Court also indicated that sex-segregated public education may be constitutional in other instances. For example, the Court stated that sex-based classifications were permissible if used “to

228. *Id.* at 5.

229. UPREP SUMMARY, at 2.

230. *Id.*

231. *VMI*, 518 U.S. at 565 (Rehnquist, C.J., concurring).

232. As noted above, the comparability standard discussed by the *VMI* majority was based on the Court’s opinion in *Sweatt v. Painter*, which required “substantial equality.”

compensate women ‘for particular economic disabilities they have suffered’ . . . ‘to promote equal employment opportunity’ . . . [and] to advance full development of the talent and capacities of our Nation’s people.”²³³ Indeed, the Court noted that “it is the mission of some single-sex schools ‘to dissipate, rather than perpetuate, traditional gender classifications.’”²³⁴ None of these reasons, however, were cited by New York in the University Prep application, and it is, therefore, unlikely that University Prep would satisfy these exemptions for permissible sex-segregated public education that the Court set forth in *VMI*.

VI. CONCLUSION

Relative to the history of traditional public education in the United States, the charter movement, as those it seeks to educate, remains in its youth. Various studies have demonstrated charter success relative to traditional public schools. To avoid the failed system of the past and the divisions in public education exacerbated by large-scale bureaucratic government control, markets should exist in which communities of stakeholders can create and innovate with public education. Having stakeholders, including students, buy into the idea that schools *want* the stakeholders involved is important in erasing many of the tensions and failures that have existed and continue to plague the U.S. public education system.²³⁵ Because students can learn critical skills through a variety of curricula, particularly through curricula that is of interest to them, expanded educational markets should continue to experiment with charters that offer curricula centered around issues of cultural consciousness, social justice, math and science, technology, arts, and so many others in incubation. Charters are primarily successful because of choice, buy-in, and structure. However, the charter market as currently constituted is illiquid. Whether due to de facto or de jure caps, the charter market’s small size hampers those attempting to attend charters, and it prevents sufficient signals of charters’ relative value from being distributed into the

233. *VMI*, 518 U.S. at 533 (citations omitted).

234. *Id.* at 534 n.7.

235. See Jeff Duncan-Andrade and GASTON ALONSO ET AL., *supra* note 89.

educational marketplace. Spurred by incentives in the No Child Left Behind Act and the Department of Education's revised Title IX regulations, the number of sex-segregated public schools has grown exponentially in the past decade. President Obama's administration is working across the political spectrum to incentivize additional charter growth, and Secretary Duncan has historically supported sex-segregated schooling. As a result, the development of even more sex-segregated charters is likely, and a 2009 sex-segregated charter approval by New York provides proof of that development as well as a useful study.

The case law that applies to sex-segregated schools is murky. The U.S. Supreme Court has decided only one case that classified primary and secondary public school ("K-12") students based on sex, and that ruling was made by an equally divided Court, without a published opinion. The Supreme Court's most recent decision regarding sex-segregated public education—at the college level in 1996—left Justice Scalia dissenting that sex-segregated schooling was "functionally dead." Meanwhile, the Court's most recent pronouncements that involved not only K-12 choice schools but also K-12 school segregation were 5-4 decisions that contained an unusually high six opinions each. Research on sex-segregated public schooling is inconclusive. Many studies, including those authored by individuals relied on by New York in the University Prep approval, suggest that the choice, structure, and buy-in of sex-segregated schools is what makes those schools successful. And because these three factors constitute the hallmarks of charter success, and because the research on sex-segregated public schooling is inconclusive, nothing *exceedingly* persuasive currently justifies the existence of sex-segregated charters. Even if some students may benefit from sex-segregated charters, *VMI* recognized that sex-segregated education provided "benefits to at least some students,"²³⁶ and the Court still struck down *VMI*'s sex-segregation as unconstitutional.

The traditional Rochester schools cannot be considered comparable to the University Prep charter, as they are not schools of choice, they lack the same buy-in and organizational structure—including the specialized curriculum—that

236. *VMI*, 518 U.S. at 534.

University Prep is implementing that proved to be of a higher caliber elsewhere in the state. University Prep did not (and likely could not) claim to compensate male students “for particular economic disabilities they have suffered,” “to promote equal employment opportunity,” or “to advance full development of the talent and capacities of our Nation’s people.”²³⁷ Nor did University Prep have as its mission to “dissipate, rather than perpetuate, traditional gender classifications.”²³⁸ As a result, a legislative desire to maintain sex-segregated charters coupled with an application process that displays even-handedness by the state with no invidious intent still does not meet the high threshold set forth by the *VMI* majority. No matter how well intentioned, the government simply cannot do whatever it wants in the name of education. Giving the government complete reign over education was precisely what caused the need for education reform. The benefits of charters appear to be what drive successful non-traditional public schools, not the claimed benefits of sex-segregated schooling. Choice, organizational structure, and stakeholder buy-in are the real drivers of successful non-traditional public education, not segregation based on students’ genitalia.

Given the material expansion in sex-segregated public education, combined with the current existence of sex-segregated charters across the country, charter innovation should be as broad and deep as possible but should not include sex-segregation unless it addresses the specific narrowly tailored permissible exceptions set forth in *VMI*. If sex-segregated charters wish to remain within the purview of both Title IX and the constitutional guidance set forth by the Court in the above cases, sex-segregated charters should not be formed as single-school LEAs, and they should: (1) exist only in states whose legislatures are clear in supporting sex-segregated charters, (2) ensure that a genuinely comparable education (i.e., “substantially equal”) is offered to the excluded sex, (3) advance the full development of the talent and capacities of students, and (4) be created to (a)(i) redress past discrimination and (ii) dissipate traditional sex classifications, (b) compensate for particular economic disabilities suffered by

237. *Id.* at 533 (citations omitted).

238. *Id.* at 534 n.7.

that sex, or (c) promote equal opportunity. Otherwise, sufficient room for charter innovation can exist by expanding the size of the school marketplace and allowing for meaningful choice based on structural factors and student buy-in without excluding students from public resources based on the students' sex.

To have any meaningful chance of surviving Title IX and equal protection clause challenges, sex-segregated charter legislation, applications, and governing documents should employ the specific language above that the Court has indicated would likely survive constitutional scrutiny. Using such precise diction in hopes of passing constitutional scrutiny, however, would likely force the proponents of sex-segregated charters to change the vision and practice of the schools that they wish to create, as these reasons neither appear to be the objectives of sex-segregated charter founders nor are mentioned in the legislative acts authorizing sex-segregated charters. Nonetheless, if the sex-segregated charter legislation, applications, and approvals worked within this narrow language in practice, sex-segregated charters may survive constitutional scrutiny; without such wording and its *de facto* implementation, sex-segregated charters appear to violate the equal protection clause and Title IX. The optimal course of action for stakeholders to take in this still uncharted territory may be to apply Chief Justice Roberts' rationale in race-based public school segregation²³⁹ to sex-segregated charters; simply put, perhaps the best way to stop discrimination on the basis of sex is to stop discriminating on the basis of sex.

239. *See Parents Involved v. Seattle Sch. Dist. No. 1*, 551 U.S. 701 (2007).